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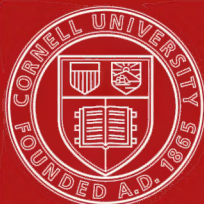
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A digest of the cases decided and report



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A
D I G E S T
OF THE
CASES DECIDED AND REPORTED
IN THE
HIGH COURT OF ERRORS AND APPEALS
AND THE
SUPERIOR COURT OF CHANCERY
OF THE
STATE OF MISSISSIPPI.

FROM 1818 TO 1847.

BY
W. C. SMEDES,
ONE OF THE REPORTERS TO THE STATE.



ANTE OMNIA, JUDICIA REDDITA IN CURIIS SUPREMIS ET PRINCIPALIBUS, ATQUE CAUSIS GRAVIORIBUS, PRÆSERTIM DUBIIS, QUÆQUE ALIQUID HABENT DIFFICULTATIS AUT NOVITATIS, DILIGENTER ET CUM FIDE EXCIPIUNTO. JUDICIA ENIM ANCHORÆ LEGUM SUNT, UT LEGES REIPUBLICÆ.

BACON, *De Augmentis Scientiarum*. Aphor. LXXIII.

BOSTON:
CHARLES C. LITTLE AND JAMES BROWN.
1847.

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DEDICATION.

TO THE

HONORABLE WILLIAM L. SHARKEY, LL. D.

CHIEF JUSTICE OF THE STATE OF MISSISSIPPI.

DEAR SIR,

I rejoice in the opportunity this publication affords me, to give a permanent expression of the admiration, esteem, and affection, I bear towards you.

Necessarily familiar, from my official position, with your judicial labors, I but echo the voice of the profession, when I say they evince a patient industry, rarely equalled; are characterized by a discrimination and judgment, in the investigation and application of facts, of the highest order; are marked by an ability seldom surpassed, and are crowned with a spotless integrity.

For fourteen years Chief Justice of the State, the substance of much of your labor is chronicled in this volume. It will bear testimony to the world, that the partiality of friends has not warped their judgment.

I cannot hope, by this public expression of my opinion, to swell in the least degree your fame, which is already an indissoluble part of the history of the state. I dedicate this book to you, as a feeble testimony of my appreciation of your public services, my esteem for your social and private virtues, and my affection for you personally.

Your friend,

W. C. SMEDES.

VICKSBURG, April 2, 1847.

ADVERTISEMENT.

I HAVE prepared this Digest for the press amid a variety of duties and labor, that necessarily prevented as much care in its preparation, as, under other circumstances, I would have bestowed.

It differs in its plan from other Digests in but one particular. It never refers the reader, when in search of a principle, to any other head than the one under which he may be looking, without, at the same time, informing him of the substance of what will be found under the head referred to ; so that he need not suspend his search to examine the reference unless it be on the point to which his attention is directed.

I have not been anxious to subdivide the different heads under which I have arranged the subjects, beyond what was absolutely indispensable for the convenience of the reader. Most matters, arranged under one head,

might with propriety and even advantage be arranged under many subdivisions of that head ; and if placed only under one, might be wholly overlooked, because sought for under a different subdivision ; while if placed under each sub-division into which the subject might have been arranged, it would have swollen the volume unnecessarily. The subjects of Chancery, Criminal Law, Evidence, Executor and Administrator, and perhaps one or two others, I have endeavored appropriately to subdivide ; but the great majority of subjects I have arranged under their respective heads, and left them without subdivision, my own experience having convinced me that it is the better plan.

I submit the book to the profession with two remarks, deprecating criticism. One is, that the distance of the place of publication from my residence, has prevented my reading the proof sheets ; and many errors and imperfections, which escape observation in the manuscript, strike for the first time when seen in print ; the other is, that the entire work is the production of such moments of leisure from other pursuits as could, in the three months in which it has been compiled, be bestowed upon it. This latter excuse, in strictness, presents no shield to the shafts of criticism ; as no one is under any obligation to throw a book before the public, until it is perfectly

ready for the public eye. Yet, as I was extremely anxious to comply with my prospectus, to present the book to the profession during this spring, and found the labor somewhat greater than I had anticipated, I think the excuse of haste, is not in this case without its weight.

W. C. SMEDES.

VICKSBURG, APRIL 5, 1847.

P R E F A C E .

I HAVE thought it not inappropriate to preface this Digest with a brief exposition of the organization of the judiciary in this State.

The whole system was remodelled in the year 1832, when the present Constitution was adopted.

The following sections of its fourth article will explain the general features of the present organization ; viz. :

“ § 1. The judicial power of this State, shall be vested in one High Court of Errors and Appeals, and such other courts of law and equity as are hereafter provided for in this Constitution.

“ § 2. The High Court of Errors and Appeals shall consist of three judges, any two of whom shall form a quorum. The Legislature shall divide the State into three

districts ; and the qualified electors of each district shall elect one of said judges, for the term of six years.

“ § 3. The office of one of said judges shall be vacated in two years, and of one in four years, and of one in six years ; — so that at the expiration of every two years one of said judges shall be elected as aforesaid.

“ § 4. The High Court of Errors and Appeals shall have no jurisdiction, but such as properly belongs to a Court of Errors and Appeals.

“ § 5. All vacancies that may occur in said court from death, resignation, or removal, shall be filled by election as aforesaid ; provided, however, that if the unexpired term do not exceed one year, the vacancy shall be filled by executive appointment.

§ 6. Requires the judges to be thirty years of age at the time of their election.

§ 7. Requires the court to be held twice a year at the seat of government.

§ 9. Prohibits a judge from sitting in a cause wherein he is interested, and provides for the appointment by the Governor of competent persons, to sit in the room of such disqualified judges. It has been necessary to exercise this power but twice, since the organization of the court.

§ 10. Provides that the salaries of the judges shall not be diminished during their continuance in office.

§ 11 – § 15. Provide for the organization of the Circuit Courts ; in substance that the circuit judges shall be elected in their respective districts, for the term of four years and shall reside therein ; the districts to contain not less than three nor more than twelve counties. The jurisdiction of the Circuit Court is original in all matters civil and criminal in this State ; but in civil only when the sum in controversy exceeds fifty dollars. These courts are to be held at least twice a year in each county in the State ; the judges are allowed to interchange circuits ; and are to receive a compensation, not to be diminished during their continuance in office.

§ 16. Provides that “A separate Superior Court of Chancery shall be established, with full jurisdiction in all matters of equity ; *provided, however,* the Legislature may give to the Circuit Courts of each county equity jurisdiction in all cases where the value of the thing or amount in controversy, does not exceed five hundred dollars ; also in all cases of divorce and for the foreclosure of mortgages. The Chancellor shall be elected by the qualified electors of the whole State for the term of six years, and shall be at least thirty years old at the time of his election.”

§ 18. Provides that “A Court of Probates shall be established in each county of this State, with jurisdiction

in all matters testamentary, and of administration, in orphan's business and the allotment of dower ; in cases of idiocy and lunacy and of persons *non compos mentis*. The judge of said court shall be elected by the qualified electors of the respective counties, for the term of two years."

§ 19. Provides that the clerk of the High Court of Errors and Appeals, shall be appointed by the court for the term of four years ; and the clerks of the Circuit, Probate, and other inferior courts, shall be elected for the term of two years.

§ 20 and 21. Establish the jurisdiction of a board of police of five members for each county, elected for the term of two years, over roads, highways, ferries, and bridges, and all other matters of county police ; and to order county elections to fill vacancies in county offices. They provide also for the election and qualification of the members.

§ 23. Provides for the election of justices of the peace to be chosen in each county by districts ; their jurisdiction to be limited to causes in which the principal of the amount in controversy shall not exceed fifty dollars.

§ 24. Is as follows, viz.: "the Legislature may, from time to time, establish such other inferior courts as may

be deemed necessary ; and abolish the same whenever they shall deem it expedient."

The Legislature have at different times exercised the power conferred by this section. In the year 1836 they established " in the counties of Warren, Claiborne, Jefferson, Adams and Wilkinson, an inferior court of criminal jurisdiction," by the name of "the Criminal Court." Concurrent jurisdiction with the Circuit Courts of the different counties was given to it, over all crimes, misdemeanors, and offences of whatever nature. The Hon. JOHN I. GUION was the first judge who presided in this court ; he held the office about a year, when he resigned ; and the Hon. J. S. B. THACHER, now one of the judges of the High Court of Errors and Appeals, was elected to fill the vacancy. In the year 1840 this court was abolished by the Legislature.

In the year 1842, the Legislature established a Vice-Chancery Court for the District, composed of the counties of Lowndes, Octibbeha, Noxubee, Winston, Kemper, Chickasaw, Pontotoc, Tippah, Tishomingo, Itawamba, Monroe, Lafayette, Marshall, De Soto, Tunica, Coahoma, Ponola, Yalabusha, Carroll, Holmes, Tallahatchie, Choctaw, and Neshoba. By the third section of the act, were given to this court " concurrent power and jurisdiction, within said District, with the Superior

Court of Chancery of this State, when the amount in controversy shall not exceed five hundred thousand dollars." The Vice-Chancellor was also, within his District, to have like power and authority with the Chancellor of the State, both in term time and vacation ; and all laws in force touching the powers and jurisdiction of the Superior Court of Chancery, or the powers, duties, and authorities of the Chancellor, or in reference to any matter or thing connected therewith, were to apply to the District Chancery Court and Vice-Chancellor, unless inconsistent with the act, or inapplicable. An appeal to the Superior Court of Chancery ; or by consent of parties, directly to the High Court of Errors and Appeals ; and a writ of error to the latter court, were also provided.

The constitutionality of this act was questioned soon after its passage. It was held by the High Court of Errors and Appeals, in the case of *Houston v. Royster*, 7 How. 543, to be constitutional. See *infra*, Title VICE-CHANCERY COURT.

The Hon. JOSEPH W. CHALMERS was appointed Vice Chancellor by the Governor, under a provision in the act, until the general election in November, 1843 ; when the Hon. HENRY DICKINSON was chosen his successor for four years.

In the year 1846, a similar court for the District, composed of the counties of Jefferson, Adams, Wilkinson, Amite, Franklin, Lawrence, Copiah, Pike, Marion, Hancock, Harrison, Jackson, Perry, Greene, Wayne, Jones, and Covington, was established.

The Hon. JAMES M. SMILEY was elected Vice-Chancellor of this court on the first Monday of May, 1846, to hold his office until the regular election in November, 1849.

The legislature have also exercised this power of creating inferior courts, in the acts of incorporation of cities, and the establishment of city courts therein for the trial of offences against the ordinances of such cities.

In March, 1833, the legislature fixed the criminal and civil jurisdiction of the Circuit Courts, within the limits prescribed by the constitution ; and also provided that they should “ have and possess original and concurrent jurisdiction with the Superior Court of Chancery, over all matters, pleas, and complaints whatsoever, belonging to, or cognizable in a court of equity, where the value of the thing or amount in controversy does not exceed the value of five hundred dollars ; also in cases of divorce and for the foreclosure of mortgages ; and such process and course of proceedings shall be had herein as in simi-

lar cases are commonly had in the Superior Court of Chancery.”

Previous to the session of the legislature of 1844 the fifty-seven counties, into which the State is laid off, were divided into eleven judicial districts, with a judge for each district, for the holding of the circuit courts. By an act of that legislature four of the districts were abolished, by which the number of districts and judges were reduced to seven ; into which the different counties were distributed. By this act the circuit court is held in each county twice in each year.

By various acts of the legislature the times of session and other regulations for the High Court of Errors and Appeals have been established. It has, as has been seen, under the constitution no original jurisdiction whatever. It is held twice in each year, in January and November, at the seat of government.

This is not, perhaps, the place to speak of the character of this tribunal, as a bench of justice ; yet no Mississippian can fail to take pride in the reputation it has conferred upon his State. Its decisions, now garnered in fourteen volumes, while they command unlimited respect and confidence at home, are acquiring a fame and character abroad for solid worth and force that are enrolling the names of our distinguished judges with

those of this and other countries who have adorned and dignified the profession.

Under its present organization, with its illustrious Chief Justice at its head, it is daily dispensing new light upon the legal world, and adding unfading laurels to its own reputation.

The Probate Court sits in every county in the State ; in nearly all monthly. The salaries of the judges are dependent, with the exception of a small per diem while court is in session, upon the sums received for services rendered by the judge in the settlement of estates, in examining accounts, &c. It is, even in the richest and most populous counties, but a meagre compensation.

The practice in these courts, was for a number of years, for want of any settled rules or forms, very various and conflicting in the different counties ; and the modes of procedure very irregular and in many instances illegal. It, of consequence, occasioned much business for the High Court of Errors and Appeals. Under the decisions of that body, with the aid of an excellent "*Treatise on the Law and Practice of the Probate Courts of Mississippi*," comprising a compilation of the Statutes of the State on the subject of the Probate Courts and the peculiar subjects of their jurisdiction, with an Appendix of Forms and Precedents, by RALPH NORTH, Esq. ;

and of a more recent publication of a more general and scientific character, which has received the highest commendation from the profession, entitled “A Digest of the Laws respecting Wills, Executors and Administrators, Jurisdiction and Practice of the Courts of Probate and Equity in relation to the Estates of Decedents ; also the Law of Descent, Distribution, Dower, and Guardian and Ward, including the Statutes and Decisions of the High Court of Errors and Appeals of the State of Mississippi ; and the Judicial Decisions of other States of the Union on the same Subjects,” by JOHN M. CHILTON, Esq., the practice in the Probate Courts is assuming a more consistent and systematic shape, and its decisions are becoming more worthy the important subjects of jurisdiction confided to them.

There is still, however, in the estimation of the writer, great room and necessity for improvement, if not for a total reorganization of the Probate system, so that the jurisdiction now exercised by those courts may be divided ; the more difficult and intricate portions to be confided to a fewer number of competent judges, well compensated and selected out of the body of the profession ; while the ordinary matters of administration may still be exercised by the tribunals as at present organized.

It is but too apparent that, in the great majority of

counties in the State, in many of which there are not more than one or two, and in some of them, no members of the profession, and with no inducements either of fame or emolument offered, it must be almost matter of impossibility to procure suitable persons to whom the *exclusive jurisdiction of all matters testamentary*, with their train of extremely delicate, complicated, and interesting questions, which have taxed the most learned minds of England and America, and of the other subjects committed to this Court, can be safely, with propriety, or to speak in the spirit of the age, *economically* entrusted. Decisions on the questions of the trusts growing out of wills, of legacies, in cases of dower, idiocy, &c., in many of which the law has to be deduced from a careful study of reported cases, can be, if made by men wholly unfamiliar with the science of law, but little better than guess-work; and must occasion an endless succession of appeals to a higher and more competent tribunal. It is fortunate for those interested in the estates of decedents that Mississippi has such a tribunal.

The Superior Court of Chancery, organized under the Constitution, by the legislature of 1833, has been and is a striking evidence of the advantage of a separate system for the administration of equity jurisprudence.

There are few States in the Union, if any, where the

Bar are more thoroughly versed in the principles and practice of that noble science. Much neglected and held subsidiary, in other States, to the principles and practice of the common law, it has been permitted in many of them, in a great measure either to be a dead letter, or else is administered in a crude and undigested style, upon imaginary and arbitrary principles of supposed conscience and right, often in violation of the settled rules of the science. In this State, elevated to its true position, by the wise provision of our constitution, as a separate and distinct system of jurisprudence, it has been administered in the true spirit and upon the true principles of the science; and it displays, in its practical operation, its benign and most advantageous results. The Courts of Chancery in this State have afforded the amplest facility for uncloaking the hidden transactions of fraud; have controlled within its legitimate bounds the jurisdiction of courts of law, and have administered not the wild and visionary views of abstract justice and equity entertained by the man who might chance to preside in the courts, but the settled and established rules and principles of the science, built up like the common law, by the hand of time, out of the material afforded by the judicial wisdom and enlightenment of ages.

And here I cannot close without paying a passing tribute to one who has stamped the impress of his name upon the judicial fame of Mississippi in this particular branch of the administration of her justice ; and who, though his body is now mingling with the dust, will live in the annals of the State, in the records of her courts, and in the reports of his decisions, while the State shall have a name. It is hardly requisite to add that I allude to the late Chancellor ROBERT H. BUCKNER.

For six years he presided over the Superior Court of Chancery ; and was equally remarked for his dignity, impartiality, industry, and ability. He understood thoroughly the whole system of equity ; and he administered its pure undeviating principles with a wisdom and judgment that would not have done discredit even to the bench on which a Hardwicke, a Thurlow, and an Eldon have presided. His court was the model of decorum and dignity. His judicial opinions, of which it is matter of deep regret that so small a portion have been preserved to the world, are daily extending the circle of his reputation. They have more than once received the emphatic commendation of his great prototype on this continent, the distinguished and venerable Chancellor

Kent ; and will continue, as they become more extensively known, to be the more appreciated.

He died young in years but ripe in knowledge and honors.

W. C. SMEDES.

VICKSBURG, April 6, 1847.

N A M E S
OF THE
JUDGES OF THE SUPREME COURT
OF THE
STATE OF MISSISSIPPI,

*From the Organization of the State Government to the period of the Adoption of the new Constitution ; and whose opinions are reported in Walker's Reports.**

Chief Justice HAMPTON.

“ “ EDWARD TURNER.

Judge ISAAC R. NICHOLSON.

“ HARRY CAGE.

“ POWHATTAN ELLIS.

“ JOHN TAYLOR.

“ JOSHUA CHILD.

“ GEORGE WINCHESTER.

“ A. MONTGOMERY.

“ ELI HUSTON.

* On application to the Secretary of State, I found that no records had been kept, of commissions to the different Judges who had presided in the old Supreme Court. It was impossible, therefore, to procure any accurate information from that office, of the period of appointment and duration of office of the respective Judges. From Walker's Reports, which cover the period of fourteen years—from 1818 to 1832—I have taken the names of the Judges who delivered the opinions ; they will be found above.

J U D G E S

OF THE

HIGH COURT OF ERRORS AND APPEALS

OF THE

STATE OF MISSISSIPPI,

Since its Organization under the Constitution of 1833.

- | | | |
|-----|---------------------------------|-----------------------|
| (a) | Hon. WILLIAM L. SHARKEY, LL. D. | <i>Chief Justice.</i> |
| (b) | “ COTESWORTH P. SMITH, | <i>Justice.</i> |
| (c) | “ DANIEL W. WRIGHT, | “ |
| (d) | “ JAMES F. TROTTER, | “ |
| (e) | “ P. RUTILIUS R. PRAY, | “ |
| (f) | “ JOHN A. QUITMAN, | “ |
| (g) | “ EDWARD TURNER, | “ |
| (h) | “ REUBEN DAVIS, | “ |
| (i) | “ ALEXANDER M. CLAYTON, | “ |
| (j) | “ JOSEPH S. B. THACHER, | “ |

(a) Chief Justice SHARKEY was elected by the people, in May, 1833; and appointed Chief Justice by the court; his office under the constitution was vacated in May, 1835; and in November of that year, he was reëlected by the people, and appointed Chief Justice by the court; in November 1841, he was reëlected by the people, without opposition and again appointed Chief Justice by the court; his term of office expires in November, 1847. At the earnest solicitation of a most respectable portion of the Bar, practising in the High Court of Errors and Appeals, he has announced himself a candidate for re-election.

(b) Mr. Justice Smith was elected in May, 1833; his term of office expired by limitation in November, 1837; in January, 1840, he was commissioned by the Governor, to fill the vacancy occasioned by the death of Mr. Justice Pray; and retained the office until the election of Mr. Justice Turner, by the people in February, 1840.

(c) Mr. Justice Wright was elected in May, 1833, for six years; he resigned his office in 1838; and has since died.

(d) Mr. Justice Trotter was commissioned in December, 1838, to fill the unexpired term of Mr. Justice Wright. In November, 1839, he was elected by the people for six years, but resigned his office in 1842.

(e) Mr. Justice Pray was elected at the regular election in November, 1837, for six years; he died in the year 1839.

(f) Gen. Quitman was commissioned by the Governor, on the 8th of January, 1840, to fill the unexpired term of Mr. Justice Pray. He declined accepting the office.

(g) Mr. Justice Turner was elected by the people at a special election in February, 1840, to fill the vacancy occasioned by the death of Mr. Justice Pray; his term of office expired in November, 1843. He was not a candidate for reelection.

(h) Mr. Justice Davis was commissioned by the Governor in April, 1842, to supply the vacancy, occasioned by the resignation of Mr. Justice Trotter. He held the office until an election by the people in August, 1842.

(i) Mr. Justice Clayton was elected by the people in August, 1842, at a special election, to fill the vacancy occasioned by Judge Trotter's resignation; Judge Trotter's term expired in November, 1845; when Judge Clayton was again a candidate, and was reelected for six years from that period.

(j) Mr. Justice Thacher was elected by the people in November, 1843; his term expires in November, 1849.

CHANCELLORS
OF
THE STATE OF MISSISSIPPI.

Hon. JOSHUA G. CLARKE,	from	1821–1827.
“ JOHN A. QUITMAN,	“	1827–1835.
“ EDWARD TURNER,	“	1835–1839.
“ ROBERT H. BUCKNER,	“	1839–1845.
“ STEPHEN COCKE,	“	1845–1851.

VICE-CHANCELLORS OF THE STATE.

Hon. JOSEPH W. CHALMERS.
“ HENRY DICKINSON.
“ JAMES M. SMILEY.

ATTORNEY-GENERALS

OF THE
STATE OF MISSISSIPPI, SINCE THE YEAR 1833.

MATHEW D. PATTON, Esq.
THOMAS F. COLLINS, Esq.
JOHN D. FREEMAN, Esq.

R U L E S
OF THE
HIGH COURT OF ERRORS AND APPEALS,
OF THE
STATE OF MISSISSIPPI,
ADOPTED AT THE JANUARY TERM, 1838.

RULE I.

WHENEVER a cause is brought into this Court from any Circuit or Probate Court, the plaintiff in error, or appellant, shall assign errors within the two first days of the term, to which the same is returnable ; and on a failure to do so, a *non pros.* may be entered ; and the defendant in error, or appellee, shall plead thereto within the two succeeding days, unless it be necessary for defendant to enter a motion before issue made up.

RULE II.

If the defendant in error, or appellee, join in error, it shall be considered a waiver of want of proper service and return of citation and writ of error.

RULE III.

If the plaintiff in error fail to file a copy of the record within the time prescribed by law, the cause may be dismissed, on producing to the Court a copy of the citation served. And if any appellant fail to file a copy of the record, within the time required by law, the appellee may have the same dismissed, on presenting and filing a copy of the record, or a certificate from the clerk of the Court in which the appeal was taken, under the seal of said Court, showing that the appeal was taken.

RULE IV.

No record or other paper shall be considered as filed until so marked by the clerk, *writs of error and citations excepted*, and the clerk shall indorse the date of filing.

RULE V.

Before any cause can be heard, the counsel shall furnish the Court with an abstract of the record, printed, or written in a plain legible hand; and the counsel on each side shall also furnish a brief, printed, or written as aforesaid, containing the points and authorities relied on; and no counsel shall be heard unless the foregoing requisites be complied with. And in no case will the Court receive a brief, after a case has been argued.

RULE VI.

If a record be imperfect, and either party wish to have it corrected, diminution may be suggested, and *certiorari* awarded : *Provided*, it be done in the first week of the term ; but, in no case shall diminution be suggested after assignment of errors, and *nullo est erratum* pleaded unless the Court may order it for information.

RULE VII.

In all appeals from the Superior Court of Chancery, counsel must prepare abstracts and briefs, as in other cases, subject to the same restrictions.

RULE VIII.

The first, and fourth, and last Saturdays of each term will be set apart for the examination of applicants for license, and no other days be appropriated for that purpose.

RULE IX.

Every Saturday shall be motion day ; and if counsel be not present at the calling of the motion docket, their motions shall be dismissed ; and no motion, once dismissed, shall be again heard.

RULE X.

Only two counsel can be allowed to argue a case on the same side, unless by special leave of the Court.

RULE XI.

No re-argument will be granted, unless the party desiring the same shall petition the Court for that purpose, which petition must be signed by, *at least, three* members of the Bar ; and it shall be discretionary with the Court whether such re-argument be allowed or not ; and all applications for re-argument shall be made within four days after the decision, and not afterwards.

RULE XII.

On a showing, predicated on affidavit, any counsel may be required to produce his authority, or show satisfactory evidence thereof, for prosecuting or defending any cause in this Court ; and on failing to produce such authority, or furnish evidence, the cause may be dismissed.

RULE XIII.

No agreement between counsel will be regarded, unless reduced to writing and signed by them, or entered of record.

RULE XIV.

No motion will be heard unless the reasons in support of it are filed with the papers on at least a half sheet of paper.

RULE XV.

No cause that has been dismissed shall be reinstated, unless it be on affidavit, setting out probable error in the proceedings.

RULE XVI.

A cause which has been set for a particular day shall not be re-set ; and no cause can be submitted, or set, before it is reached on the docket.

RULE XVII.

At each term of the Court, the docket will be taken up and the causes disposed of in their order, unless it be suggested in writing to the Court, that certain causes have been brought up for delay ; and if the Court shall be satisfied of the truth of such suggestion, the Court will take up such causes first, and make proper disposition of them.

RULE XVIII.

No motion will be heard unless it has been entered on the docket one entire day before it is called.

RULE XIX.

When a motion is made to dismiss, and the counsel either withdraws the motion, or suffers it to be dismissed, for want of prosecution, it shall be considered as a waiver of the defect, on which the motion was predicated ; and such defect will not be noticed by the Court, unless it be so material that no judgment can be given.

RULE XX.

All assignment of errors shall be made on at least a half sheet of paper ; and no assignment will be noticed which is made on the paper on which the record is made out.

RULE XXI.

No joinder in error shall be withdrawn for any other purpose than allowing the party to plead in bar to the writ of error.

RULE XXII.

Whenever a party shall rely on an excess in the calculation of interest, or damages, for a reason for reversing the judgment, a true calculation shall be presented to the Court, in writing and figures, with a certificate by some counsellor, not interested in the cause, that the calculation is correct, and no such error will be noticed unless so presented to the Court.

RULE XXIII.

All process returnable to this Court shall bear test in the name of the presiding judge.

RULE XXIV.

No cause shall be submitted without argument, unless by approbation of the Court.

RULE XXV.

In all appeals from the judgment of any Circuit Court, the securities must be approved by the Court, and the bond must be executed during the term at which such appeal was prayed.

RULE XXVI.

In appeals from Chancery, the rules of practice in that Court shall be adopted as the rules of this Court, so far as they can be made applicable.

ADDITIONAL RULES.

ADOPTED JANUARY TERM, 1840.

RULE XXVII.

Hereafter when any cause is reached on the docket, if no counsel appear on either side, or when no counsel be marked on the docket, the cause shall be dismissed. *Provided, however,* that such dismissal, may be set aside on good cause shown, supported by affidavit ; but in no case shall such dismissal be set aside unless the affidavit also show that there are probable merits.

RULE XXVIII.

When any defendant in error shall be dissatisfied with the security taken in any writ of error bond, he may move the Court for a rule upon the plaintiff in error to show cause on a day to be named, why the *supersedeas* should not be discharged or other security given ; a copy of which rule shall be served on the plaintiff in error, at least five days before the expiration of the same. The motion for the rule must be founded upon an affidavit of the insufficiency of the security taken ; and the affidavit of a person interested in the judgment below may be read in support of the application. If the Court

is satisfied from the affidavit, that there is cause to interpose, the rule will be entered. On showing cause, affidavits taken by either party may be read to show the sufficiency or insufficiency of the security taken ; provided reasonable notice be given of the taking of the same. The affidavit of the security may be taken. If the security is adjudged insufficient, the additional security must be approved by the Court.

RULE XXIX.

When a re-argument is ordered, the re-argument shall be had at the same term at which it is granted ; the cause to be placed at the end of the docket of the district to which it belongs.

RULE XXX.

ADOPTED JULY TERM, 1840.

When a plaintiff in error shall file a record duly certified before a writ of error issues, or where a writ of error may have been set aside as defective and a new writ issues, it shall not be necessary to send said writ of error to the clerk of the inferior Court ; but the writ shall be made out and filed by the clerk of this Court with the said record, which record shall be taken and considered as a due return to said writ.

A D D I T I O N A L R U L E S.

RULE XXXI.

Hereafter when any cause is reached on the docket, if the papers or record be out of the office, then the party or counsel may take such judgment against the party who took or has such papers or record as he may think proper ; or the Court may, at its discretion dismiss said cause or continue it.

RULE XXXII.

ADOPTED NOVEMBER TERM, 1844.

The briefs of the members of the Bar designed for publication in the reports of the decisions of this Court, shall hereafter not exceed five foolscap pages in length, unless in cases specially exempted by the Court.

Members of the Bar, however, who desire to argue their cases in writing, at greater length, can do so, upon preparing a synopsis of their arguments of the required character for the reporters ; *provided*, that all briefs may be abridged at the discretion of the Court, if, in their opinion, a brief five pages in length is unnecessary.

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DIGEST.

ABATEMENT.

1. The death of a person for whose use the suit is brought does not abate the suit. *Holt, use of Norton v. Briscoe*, Walk. 19.

2. Under the act of 1837, requiring the holder to sue all parties to a bill of exchange or note, in a joint action, if the holder sue one of the indorsers on a bill, without joining the other parties, the defendant must take advantage of the omission by plea in abatement, verified by affidavit, that the other parties not sued are living and resident in this state; such a plea will be defective without affidavit; nor can the omission to sue the other parties be taken advantage of by demurrer; it can only be done by plea in abatement. *Lillard v. Planters Bank*, 3 How. 78; *Wells v. Patterson*, 7 How. 32; and the maker of a note indorsed, when sued alone, may avail himself, by plea in abatement, of the like defence; nor will such plea in abatement be bad, because it does not aver that all the indorsers of the note are living and resident in the state; the presumption will be that only those embraced in the plea are; and if, on the trial of the

plea, it turn out otherwise, the plea will be disproved; but on its face it is not defective. *Stevenson v. Walton*, 2 S. & M. 262; and if the maker be not joined in the suit with the indorsers, and the reason given in the declaration be, that there is a judgment already against the maker and the defendants plead the non-joinder of the maker in abatement, and the plea be demurred to; *held*, that the judgment thereon should be in favor of the defendants. *Agricultural Bank v. Harris*, 2 S. & M. 463; but the act of 1837 does not apply to joint notes that have never been indorsed. *Thompson v. Planters Bank*, 2 S. & M. 476.

3. A plea in abatement to a suit by a corporation, denying its corporate character, is bad. *Carmichael v. Trustees of School Lands*, 3 How. 84.

4. Where a plea in abatement is filed, and leave to amend is granted the plaintiff, by which the abatable matter is cured, no further disposition of the plea need be made. *Webster v. Tiernan*, 4 How. 352.

5. A plea to the action is a waiver of a plea in abatement. *Ib.*

6. A statute was passed prohib-

iting directors of banks from being attorneys for such bank ; and to a suit brought by a bank, the defendant pleaded in abatement, that the attorney was a bank director ; and concluded his plea with a prayer that the writ and declaration might be quashed ; *held*, that the plea was bad ; it being one merely to the disability of the plaintiffs to sue, ought to have concluded with " if the plaintiff ought to be answered." *West Feliciana Railroad Company v. Johnson*, 5 How. 273.

7. See *Attachment*, 36 ; when plea in abatement to, lies.

8. See *Partner*, 16 ; what entry of death will authorize suit to proceed in name of survivor and effect of, if entry be false.

9. A party having several matters in abatement may file as many different pleas in abatement. *Pharris v. Conner*, 3 S. & M. 87.

10. See *Banks, &c.* 27. The defence that a bank had transferred its paper in violation of its charter, can only be taken advantage of by plea in abatement.

11. A plea in abatement to an action of assumpsit upon a note, that the writ and indorsement, do not show the sum actually demanded, is a good plea, and, if true, will abate the action ; and it is in the discretion of the court below to permit the plaintiff to amend his writ or not ; if, however, the suit be against more than one, and one plead in abatement, and the others non-assumpsit, the action should be abated as to one, and retained for trial as to the other. *Foster v. Collins*, 5 S. & M. 259.

12. Our statute directs that the death of the nominal plaintiff, during the pendency of a suit, shall not cause its abatement ; but it does not authorize the commence-

ment of a suit in the name of a person no longer in existence : if, therefore, the nominal plaintiff was dead at the time the suit was commenced, it must abate. *Humphreys v. Irvine*, 6 S. & M. 205.

13. It is a good plea in abatement of an action *ex contractu*, that too many persons are joined as defendants ; as where three persons are sued as members of a firm, and the plea in abatement sets up that the firm was composed of but two ; and if a demurrer to such plea be sustained improperly, the error will not be cured by a subsequent discontinuance of the suit as to the party improperly joined ; it seems it would be otherwise if the discontinuance had taken place before the decision of the demurrer. *Gasquet v. Fisher*, 7 S. & M. 313.

14. The statute H. & H. 597, §43, which declares that it shall be lawful for a defendant in any suit to plead as many pleas in bar of the action as he shall choose, although some of the pleas may be to the party or to the character of the parties suing, embraces pleas in abatement. *James v. Dowell*, 7 S. & M. 333.

ACCORD AND SATISFACTION.

See *Covenant*, 2. What, pleadable to an action of covenant sounding in damages.

ACCOUNT.

1. See *Assignor and Assignee*, 1 and 2, as to the rights of the assignee of an open account. *Deference v. Davis*, Walk. 69.

2. See *Practice*, 15, as to right to and effect of withdrawal of account sued on.

3. See *Chancery*, 3, as to how far, when account is prayed for by bill, complainant can object to it.

4. See *Bill of Exchange and Promissory Note*, 19, as to how far account is merged in note.

5. The account required by the statute to be filed with the declaration, must state distinctly the several items of the plaintiff's claim against the defendant; therefore this allegation in a count in the declaration that the defendant was, before a particular day named in the count, indebted to the plaintiff in a specified sum for money before that time loaned, is not sufficient to entitle the plaintiff to give proof under it. *Soria v. The Planters Bank*, 3 How. 46.

6. See *Bill of Particulars*, 1 and 2; what necessary items of account to be filed with declarations.

7. Where no objection is made for want of a bill of particulars before verdict, in an action for money had and received, none can be made afterwards. *Bank of Louisiana v. Ballard*, 7 How. 371.

8. A totally new account and declaration may be filed under leave to amend. *Davis v. Presler*, 5 S. & M. 459.

AGENT.

1. A special agent who exceeds his authority, does not bind his principal unless the latter ratify his act; but the act of a general agent, within the limits of his ostensible powers as a factor, consignee, or otherwise, binds the principal, though he may have given se-

cret instructions to pursue a different course. *Landsdale v. Shackelford*, Walk. 149.

2. Agency may exist under an implied as well as express authority and if under an implied, it is a question of fact for the jury to say whether such implied agency exist. *Wilkins v. Commercial Bank of Natchez*, 6 How. 217.

3. An agent cannot bind his principal beyond the extent of his authority, and the power of a special agent within his authority, is more circumscribed by the law than that of a general agent; any act exceeding the special agency is void; where, therefore, an agent having power only to collect a debt, receives claims from the debtor on third persons with an agreement to collect them and refund the overplus, and the debtor knew the nature of the agency, the principal is not bound for the overplus nor answerable for negligence in the collections. *Fox v. Fisk*, 6 How. 328.

4. The receipt purporting to be made by an agent, is admissible in evidence, as a link in the chain of evidence, though the agency be not first established. *Wells v. Patterson*, 7 How. 32.

5. See *Bill of Exchange and Promissory Note*, 103; if note is made by agent and principal sued, and he wish to deny the agency, he must do it by plea under oath.

6. Where an agent has to appoint a sub-agent, he will not ordinarily be responsible for the negligence or misconduct of the sub-agent, if he have used reasonable diligence in his choice as to the skill and ability of the sub-agent. *Tiernan v. Commercial Bank of Natchez*, 7 How. 648.

7. See *Bill of Exchange and Promissory Note*, 118; where note

is signed in blank, the holder is an unlimited agent.

8. The act of an agent who exceeds his authority, is binding to the extent of his authority, but void for the residue. *Johnson v. Blasdale*, 1 S. & M. 17.

9. See *Evidence*, 223; when agent competent witness.

10. The subsequent recognition of an act done by an agent or by one who assumes to act as such, is usually as binding on the principal, if made with a full knowledge of the act done, as a previous authority; and it is for the jury to say, from the acts and declarations of the principal subsequent to the performance of the act, whether he has made such recognition and possessed such knowledge. *Baker v. Byrne*, 2 S. & M. 193.

11. In the case of a special agent who is constituted for a particular purpose and under a limited authority, his principal is not bound if he exceed that authority; but he is bound if the agent keep within the general scope of his authority, though he act contrary to private instructions; therefore where a power of attorney was given by A. to B. to transact all A.'s business at a particular bank, to borrow money, to contract with the bank on notes drawn in A.'s favor or in favor of any other person, to receive notice of protest, &c. &c.; but did not give B. the power to sign A.'s name as surety, A. will not be liable on a note to which B. signed his name as surety, and which was discounted by the bank. *Planters Bank v. Cameron*, 3 S. & M. 609.

12. See *Bank*, 30; a corporation may confirm the act of its agent and make it valid.

13. C. being sued on three notes

made by an agent, pleaded *non assumpsit*, with an affidavit of its truth, and that the notes were not made by him; the plaintiff on the trial read a power of attorney from C. to the agent, authorizing him to purchase goods for C., to keep up a mercantile establishment owned by C., either for cash or on a credit, and to execute the notes of C. for that purpose; after the introduction of the power of attorney, the plaintiff, without other proof of the execution of the notes sued on, read them *without objection* on the part of the defendant to the jury; held, that by thus permitting the notes to be read, the defendant waived further proof of their due execution, and that it was a tacit admission on his part that the notes were duly executed by the agent in the proper purchase of goods; and that he could not object to want of evidence of the due execution on motion for a new trial or in the high court. *Carter v. Taylor*, 6 S. & M. 367.

14. It is requisite, before a principal can be held bound by the acts of his limited agent, not only to prove the agency but also to prove that the act done was within the scope of the agency; thus where, in an action against a principal on a note made by his agent, it is proved that the agent was authorized to execute the note of his principal in the purchase of goods, it must also be proved before the principal will be liable that the notes were actually so executed. *Ib.*

15. See *Deed*, 49; deed by agent, to be valid, must be in the name of the principal.

16. Where an agent fraudulently assigned promissory notes belonging to his principal, to one who was indorser for the agent personally, to indemnify him against such in-

dorsement, and where the notes on their face were payable to the agent as such, *held*, that the assignee would be chargeable with notice of the claim of the principal, would not be a *bona fide* purchaser, and would have to deliver the notes and their proceeds to the principal. *Holmes v. Carman*, Freem. Ch. 408.

ALIEN.

W. being appointed consul for one of the ports of Texas, when a republic, by the United States, moved there in 1835, with his wife ; he remained a short time and died ; in the spring of 1836 his wife returned to the United States ; about the time of his departure for Texas he declared his intention of resigning his consulate and settling in Texas and practising law ; *held*, the facts did not constitute an alienage of W. *Wooldridge v. Wilkins*, 3 How. 360.

ALTERATION.

1. If after a note has been delivered to the payee, a particular place of payment be inserted therein by interlineation, without the maker's consent, the note will be void. *Oakey v. Wilcox*, 3 How. 330.

2. Whether an alteration in a note by the erasure of the name of one of the makers is a material alteration, is a question for the court. *Hill v. Calvin*, 4 How. 231.

3. See *Bill of Exchange and Promissory Note*, 114. An alteration on the face of the note must be accounted for by holder.

AMENDMENT.

1. The allowance or disallowance of amendments is in the discretion of the inferior court, and will not be revised by the high court. *Green v. Robinson*, 3 How. 105 ; *Warbington v. Norris*, 3 How. 227 ; *Newman v. Foster*, 3 How. 383 ; *Shrophshire v. Judge of Probate*, 4 How. 142 ; *Vicksburg Water Works and Bank. Co. v. Washington*, 1 S. & M. 536 ; *Planters Bank v. Walker*, 3 S. & M. 409. Not even where the amendment extends to the addition of another party plaintiff. *Tanner v. Hicks*, 4 S. & M. 294 ; *Archer v. Stamps*, 4 S. & M. 352.

2. It seems that, under permission to amend in a suit by an administrator, he may change his demand from a general right as administrator to the property sued for, to a claim for personal property specially acquired by his intestate after his marriage and during his coverture. *Carmichael v. Browder*, 4 How. 431.

3. The filing of additional pleas after the pleadings are made up, is a question of amendment within the discretion of the court, and the refusal of the court below to permit them to be filed will not be ground of error. *Henderson v. Hamer*, 5 How. 525.

4. See *Judgment*, 82, 83 ; for power of circuit court to amend judgment in vacation, and effect of it.

5. Amendments should be freely and liberally allowed to the very moment of trial ; it seems they should not be beyond that limit. *Moss v. Davidson*, 1 S. & M. 112.

6. Courts may amend their proceedings, as a general rule, during

the term at which they take place, if there is anything to amend by; the rule is not unlimited; after the jury are discharged from a case and their verdict rendered, the court cannot correct the verdict in matter of substance, at least not without the consent of the jury. *Walker v. Commissioners of Sinking Fund*, 1 S. & M. 372.

7. Where a demurrer to a plea is overruled, leave to amend and file a replication ought to be granted by the court below; but if refused it will not be ground of error. *Vicksburg Water Works and Banking Co. v. Washington*, 1 S. & M. 536.

8. It is error to permit a sheriff to amend his return on mesne process, after the return term, without notice to the adverse party. *Williams v. Oppelt*, 1 S. & M. 559; *Dorsey v. Peirce*, 5 How. 173. But it is otherwise on final process; that may be amended at any subsequent term; where, therefore, a sheriff returned, that he had levied "on two hundred bales of cotton," and on the trial of the right of property thereto, it was proposed to permit the sheriff to amend his return and show that the levy was in part made on the cotton in the seed which, when ginned and baled, amounted to only one hundred and seventy bales; *held*, that the amendment should have been allowed, but being in the discretion of the court, its refusal to allow it was not error. *Planters Bank v. Walker*, 3 S. & M. 409. But after judgment the sheriff cannot amend his return on mesne process, and if the amendment is made it will be void; where, therefore, a sheriff returned process executed and was after judgment, allowed to amend the return so as to show that the pro-

cess was not executed according to the statute; *held*, that the amendment was void and the judgment must stand. *Hughes v. Lapice*, 5 S. & M. 451.

9. See *Process*, 16; mere clerical error in, as being returnable to wrong term, amendable on motion.

10. Courts may amend the mistakes or errors of their clerks made at a previous term, provided there is anything in the record or proceedings to amend by; but they cannot amend their judgments except in the mode provided for by statute; where, therefore, a judgment was rendered at a prior term erroneously final by default, the court at a subsequent term could not amend it and add that it was done by consent from memoranda on the judge's docket or parol proof. *Russel v. McDougal*, 3 S. & M. 234.

11. The court should allow the amendment of an immaterial variance between the proof and pleadings so as to make them correspond. *Fulcord v. Hamberlin*, 4 S. & M. 649.

12. See *New Trial*, 51; fraud cannot be committed in filing an amendment when filed by leave, even though a totally new declaration and account are filed.

See *Chancery*, tit. *Amendment*, *passim*.

APPEAL AND APPEAL BOND.

1. See *Justice of Peace*, 1; as to trials of appeals in circuit court without issue or judgment. *Lindsey v. Herd*, Walk. 18; *Horn v. Gillock*, *ib.* 107.

2. Right to *certiorari* may exist after right to appeal has expired. *Duggen v. McGruder*, Walk. 112.

3. An *appeal* bond must be ap-

proved in court ; and the court cannot delegate the clerk to approve it, nor can the bond be executed in vacation. *Pickett v. Pickett*, 1 How. 267.

4. See *Chancery*, 76 ; for appeal from demurrer.

5. If an appellant fail to file his record in the high court, with the clerk, on or before the first day of the term to which it is returnable, and the appellee fail also to produce a copy of the record and have it dismissed under the statute, and the record be subsequently filed at a succeeding term, the appellee will not be entitled to a dismissal of the appeal as a matter of right. *Carmichael v. West Feliciana Railroad Company*, 2 How. 817.

6. The death of a party after appeal taken, and before the return term, will excuse failure to assign errors, though his representatives could have revived at the return term. *Ib.*

7. An appeal bond can only be impeached for errors on its face ; if it purport to be executed by attorney, it will be presumed to have been so executed, without showing the power of attorney. *Ib.*

8. An appeal must be prayed and the appeal bond executed at the term when the judgment appealed against is rendered. *Coffman v. Davanay*, 2 How. 854.

9. Where several defendants appeal from a judgment against them and others, on a joint and several demand, they will not be permitted to resort to errors in the judgment against those who do not appeal. *Peyton v. Scott*, 2 How. 870.

10. An appeal bond must be in the name of all the parties against whom the judgment is rendered ;

if some of the parties will not join in the appeal, those who desire it may proceed by summons and severance, and disconnect themselves from the others. *Green v. Planters Bank*, 3 How. 43 ; otherwise, the appeal will be dismissed. *Duval v. Cox*, 5 How. 12.

11. The law requires, on appeal from the decision of the probate court, that the appeal bond itself as well as the surety, shall be approved by the court ; a bond executed in vacation therefore, under an order of the court, allowing it with a stated surety, is irregular, and the appeal will be dismissed. *Porter v. Gresham*, 3 How. 75. But if it appear that the bond was executed in term time, though the order allowed it to be done in vacation, the appeal will be upheld. *Carmichael v. Trustees of School Lands*, 3 How. 84. The appeal bond must, under the statute, be made payable to the judge of probate, and not to the parties ; and if to the latter, the appeal will be dismissed. *Harper v. Archer*, 4 S. & M. 99 ; *Alexander v. Smith*, 4 S. & M. 258.

12. An appeal bond conditioned to pay and satisfy all such damages and costs as the appellee may sustain in defending the appeal, and to perform such judgment as the high court may adjudge, is bad ; it should be to pay the amount of the recovery and all costs and damages awarded, in case the judgment be affirmed. *Bowie v. Hagan*, 5 How. 13.

13. Under the statutes in this state, appeals in criminal cases do not lie to the high court of errors and appeals from the circuit court ; such causes can only be removed by writ of error. *State v. Tuomey*, 5 How. 50.

14. If it appear from the re-

cord that all the parties prayed the appeal, it will be sufficient under the statute, although the bond be executed by one only. *Barker v. Wanzer*, 5 How. 290.

15. An appeal lies from an interlocutory order of the probate court, which may involve the merits of the cause or prove a grievance to the party appealing; the statute authorizing appeals from any judgment, decree, decision, or order of the probate court. *Green v. Tunstall*, 5 How. 638.

16. It seems that under the statute, any person who is aggrieved by the orders or decrees of the probate court may appeal therefrom without making the other parties to the record on the same side, parties to the appeal. *Porter v. Porter*, 7 How. 106.

17. See *Executor and Administrator*, 68; they may appeal without giving bond; but not if the judgment is to make him personally liable.

18. An appeal at law lies only from a final judgment; it does not lie, therefore, from a refusal of the circuit court to dismiss a *certiorari* from a justice court. *Porter v. Deterly*, 1 S. & M. 163. Nor from the grant of a new trial, until the second verdict. *Bank of Lexington v. Taylor*, 2 S. & M. 27.

19. Where, under the statute in a trial in a justice's court, an appeal is taken to a jury, and bond given to abide the verdict, and after verdict the case is removed to the circuit court by *certiorari*, and the judgment of the justice affirmed, the circuit court should render judgment on the appeal bond given in the justice's court, against both principal and surety. *Wright v. Simmons*, 1 S. & M. 389.

20. The execution of an appeal bond by the *appellant*, is a condition precedent to the jurisdiction of the appellate court; an appeal bond by a *third person* will not, therefore, sustain an appeal; otherwise with writs of error. *Hardaway v. Biles*, 1 S. & M. 657.

21. An execution was issued on a sale bond against C., who, on petition, obtained a supersedeas which the chancellor discharged, and C. appealed to the high court, giving bond with surety; *held*, that on affirmance of that decree, judgment should be entered against the principal and surety in the appeal bond, for the debt superseded, with damages, interest and cost. *Conger v. Robinson*, 4 S. & M. 210.

22. An appeal bond, the condition of which was, that, if the appellant, in case he should fail to prosecute his appeal with effect, should, within thirty days thereafter, well and truly perform the decree of the superior court of chancery, and also abide by the decision of the high court of errors and appeals in the premises, then the obligation should be void, otherwise should be in full force and virtue, though not in literal is in substantial compliance with the statute. *Ib.* It is sufficient if the appeal bond substantially cover the provisions of the statute; where, therefore, the statute required the condition of the appeal bond to be "to pay, satisfy and perform the decree or final order of the superior court of chancery, and all costs, in case the same be affirmed" and upon an appeal from such a decree, dissolving an injunction to a judgment at law, the condition of the appeal bond was "to pay and satisfy the judgment so recovered against him," the bond was held to be, in substance, in com-

pliance with the statute. *Coleman v. Rowe*, 4 S. & M. 747.

23. Under the statute granting appeals in certain cases, from interlocutory orders, an appeal will lie from an order of the chancellor appointing a receiver. *Wade v. The American Colonization Society*, 4 S. & M. 670.

24. Where the requisites of the statute granting appeals from the decision of the chancellor, are complied with, an appeal by its own force suspends the operation of the decree; but unless the appeal bond is approved by the chancellor, the appeal will not suspend the operation of the decree; where, therefore, the chancellor has appointed a receiver of property, who has executed bond in the penalty of one hundred thousand dollars, and the defendant has appealed from the order and executed bond, in the penalty of two hundred dollars which it does not appear the chancellor has approved, the appeal will not suspend the decree appointing the receiver, who can proceed to take the property. *Ib.*

25. See *Probate Court*, 25; an appeal will not lie from interlocutory order, such as the order referring a claim to referees.

26. Where, in an order granting an appeal from his decision, the chancellor first named three persons as sureties, and afterwards made the following order: "In addition to the sureties named in the original order, granting an appeal, any two of them, or the following persons, to wit, &c.," are approved; held, that an appeal bond executed by two of the persons first named, no objection being made to their sufficiency, was in compliance with the order of the

chancellor. *Coleman v. Rowe*, 4 S. & M. 747.

27. An application for an appeal from an interlocutory decree of the chancellor, where money is not required to be paid or property transferred by the decree, is addressed to the discretion of the chancellor, and will not be granted, if any important principle in the case remains undecided. *Wright v. Petrie*, 1 S. & M. Ch. 326

APPEARANCE.

1.. An appearance and plea, it would seem, cure the absence of original process; if not, the defect cannot be taken advantage of by writ of error, but only by writ of certiorari. *Delahuff v. Reed*, Walk. 74. An appearance and plea cures defective service of writ. *Stevens v. Richer*, 1 How. 522; even though plea be a nullity, *Young v. Rankin*, 4 How. 27. After pleas filed, and two verdicts rendered, and new trials granted, it will be too late to set aside the service of the writ in the case for defect therein; and if that be done and the bill of exceptions taken thereto by the plaintiff recite that the order thus excepted to was made on motion of the *plaintiff*, while the judgment of the court recites that it was made on motion of the *defendant*, the latter construction will be adopted as most sensible and consistent with the record. *Wooten v. Wingate*, 6 S. & M. 271.

2. The recital of the clerk in the record "this day came the parties by their attorneys, and the defendants withdraw the plea by them pleaded, &c.," will not constitute one appearance for those

defendants not served with process. *Pittman v. Planters Bank*, 1 How. 527; *Torrey v. Jordan*, 4 How. 401; *Dean v. McKinstry*, 2 S. & M. 213; *Harrison v. Agricultural Bank*, 2 S. & M. 307. The recital in the record of a judgment obtained in Alabama, that "the parties came by their attorneys, and that a jury came to try the issue," is, under the decisions in that state, conclusive on the defendant of his appearance to the action, though no service of process appear, nor special appearance be entered; and in comity to the decisions in that state and in accordance with the act of congress giving effect to the judicial proceedings of the different states, will render the judgment a valid and binding one, against the defendant, in an action on the judgment in this state; though it would be otherwise in a case from a state whose decisions were different from those in Alabama. *Wright v. Weisinger*, 5 S. & M. 210.

3. A plea filed, making defence, though a nullity for want of affidavit, will be, coupled with an entry of the record that the defendant appeared and filed exceptions, a sufficient appearance of the party to the suit. *Young v. Rankin*, 4 How. 27. A plea that "the defendants came," &c., is a plea for all the defendants as well those served with process as those not served. *Jones v. Hunter*, 4 How. 342; *Henderson v. Hamer*, 5 How. 525.

4. See *Process*, 16. Appearance in a motion to quash writ will cure a clerical error in the writ.



ARBITRATION AND AWARD.

1. Where an agreement has

been made in a cause pending in court, to refer it to arbitrators, whose award shall constitute the judgment of the court, and that is accordingly done, an execution may issue on it. *Laine v. Shrock*, Walk. 316.

2. See *Judgment*, 15; on award how far *final* by default.

3. See *Chancery*, 301, for specific performance of award.

4. An award of arbitrators, upon a parol submission, is not conclusive as awards on submissions in writing are; where, therefore, a party is sued on such award, it is competent to show, by parol, what matters were submitted to arbitrators, in order to show that their award was not in accordance with their authority. *Tucker v. Gordon*, 7 How. 306.

4. An action to enforce an award cannot be maintained without proof of a submission on the part of the defendants. *Hand v. The Town of Columbus*, 4 S. & M. 203.

5. Where, in an action by the president and select-men of a town to enforce an award in their favor, it did not appear in proof that the board officially authorized the submission, or that a majority of them subsequently ratified it, and the court instructed the jury that if the members of the board signified their approval of the submission in conversations, it would be sufficient; *held*, that the instructions were erroneous and calculated to mislead the jury, and that proof of submission by the board, without proof of it also by the defendants, would not be sufficient. *Ib.*

6. An award must always be in strict accordance with the submission and not extend to subjects not

submitted, nor to strangers to the submission ; and it must be certain and mutual ; lacking any of these requisites it is void ; yet an award containing illegal matter, will be upheld as to the matter actually submitted, provided the part which is good can be separated from and exist independently of that which is bad ; but an award good in part and void as to the rest, cannot be enforced, if either party can object to the performance of his part, on account of the want of a remedy to enforce on the other the performance of that part which is void. *Gibson v. Powell*, 5 S. & M. 712.

7. Gibson, holding two notes of Harmon Powell, Henry Powell and Henry C. Bennett, for the sum of \$3595, each, subject to certain credits and a controversy arising about them ; it was agreed to submit the matters in dispute to three arbitrators ; the submission, signed by Gibson, H. Powell and H. C. Bennett, merely recited the controversy to be about two notes held by Gibson and made by the others, without describing the notes or naming the arbitrators and contained an agreement to abide by the award ; the award described the notes in full with the credits on them, with the interest showing the balance due by the makers to be \$6667 97, and directed that James Powell, not a party to the submission, should make a deed to Gibson of certain property, and the notes therefor be credited with \$3983 ; that of the balance due, Harmon Powell should pay \$1790 and H. C. Bennett \$895 ; that certain lumber and hogs should be divided between Harmon Powell and Bennett, and that Powell and Bennett should confess judgment with stay

of execution. *Held* that the award was wholly void. *Ib.*

8. Whether an award upon the *voluntary submission* by the parties to arbitration, made by the arbitrators without notice to the parties is void ? but if a bill set up an award and traces the claim of the complainants through it, the award will be held *prima facie* good on *pro confesso* even though the bill does not aver that the award was made upon notice. *Upshaw v. Hargrove*, 6 S. & M. 286.

9. J. having a claim against the state, the legislature passed a law by which the governor, the auditor and the commissioner of public buildings were authorized to examine his accounts and to make him such allowance as they might find him entitled to ; *held* that if J. assented to the law by having his accounts examined under it and they decided against him, he was precluded from making further claim. *Jack v. The State*, 6 S. & M. 494 ; and if to a bill filed by J. against the state, it pleads the award of these persons that there was nothing due J., it must be established by strict proof and the mere certificate of these officers to the effect set up in the plea but which did not state that J. submitted his accounts to them for examination or was present, will not be sufficient. *Ib.*

ASSAULT AND BATTERY.

1. A prosecutor in an indictment for assault and battery, who has commenced a civil suit for the injury, will not be compelled to elect and abandon one or the other ; both may be maintained. *State v. Blennerhassett*, Walk. 7.

2. Defendants separately indicted for the same assault and battery, may be tried jointly, although they may have claimed the right to be tried separately. *Ib.*

3. See *Evidence*, 206; when one defendant in action for assault and battery good witness for the other.

4. A husband may be convicted of an assault and battery upon his wife. By the ancient common law, the husband possessed the power of chastising his wife; and he should perhaps, be permitted to exercise that power moderately in cases of great emergency, and to use salutary restraints in every case of misbehavior without submitting himself to vexatious prosecutions, discreditable to all the parties concerned. *Bradley v. State*, Walk. 156.

ASSIGNMENT FOR BENEFIT OF CREDITORS.

1. A corporate body can make an assignment of its property in trust, for the payment of its just debts, preserving to each creditor the right of sharing, *equally*, according to the amount of his claim. *Robins v. Embry*, 1 S. & M. Ch. 207.

2. The property of a banking corporation is a *trust fund* for all its creditors, and in an assignment by such a corporation, if a preference in favor of the debts due to any particular creditor, or set of creditors, is given, the assignment will be void — *sed quære?* *Ib.*

3. Banking corporations are trustees not only for the stockholders, but also for the creditors, who have a *prior and permanent equity*. *Ib.*

4. The creditors of a corporate body can enforce their claims

against any of the property of the incorporation, in the hands of persons affected with a knowledge of its corporate character. *Ib.*

5. It is essential to the validity of an assignment by an incorporation, that the assignor, by the assignment, part absolutely with all title to the property, and all authority to control it, free from all restrictions which will necessarily delay creditors; there must be no reservation for the assignor's benefit, except of the surplus; no authority given to control or direct the assignees; and all the uses must be expressly declared; when any of these objections exist the assignment will be void. *Ib.*

6. A banking company, to which a railroad, was by its charter affixed, having nearly completed the road, and exhausted its means, being compelled to make an assignment for the benefit of its creditors and the period for completing the road allowed by the charter of the company having nearly expired, the expiration of which, without the completion of the road, would cause a forfeiture of the charter, and the road in its then condition, being comparatively worthless, and its not being completed would be a total loss to the company of the amount expended, and would, if not destroy greatly diminish, the ability of the company to meet its debts; *held*, that a provision in the deed of assignment, authorizing the assignees to borrow two hundred and fifty thousand dollars to complete the road, and pledging the assets of the company, and the profits of the road, for the payment of that sum when borrowed, before any of the other debts were paid, *did not vitiate the assignment*. *Ib.*

7. If an assignment be otherwise free from the imputation of fraud, it is not vitiated by being made in part to secure anticipated advances, especially where those advances are in aid of the general purposes of the assignment. *Ib.*

8. A banking corporation with a railroad annexed, in making an assignment of its effects to assignees, to pay its debts, assigned to the assignees the power of managing and controlling the railroad; *held*, that this provision of the assignment merely assigned the profits of the road, with the temporary control of the road to the assignees, for the benefit of the creditors, and did not vitiate the assignment. *Ib.*

9. In such case if the charter had required a committee of the directory to manage the road, an assignment by the directory, of the management of the road to others than a committee of the directory, would be a matter between the directors and stockholders, or the latter and the government, and could not be questioned by another person. *Ib.*

10. A provision, in a deed of assignment, by a corporation, that the directory should have power to appoint new trustees, to fill any vacancy that may occur by death or otherwise, is not a reservation that will vitiate the assignment. *Ib.*

11. Where, by an assignment for the benefit of creditors, twelve months were allowed to collect the debts, and convert into money the property of the assignor, before distribution among the creditors, the debts being numerous, and widely scattered over the country, and the creditors of the assignor residing at distant places; *held*, that the time allowed was not un-

reasonable, and would not render the assignment void. *Ib.*

12. Where an assignment is made by a bank, of its effects, to pay its debts, at a period of great pecuniary embarrassment, and general insolvency, and power is given by the assignment to the assignees to compromise with the debtors of the bank, in such manner as would be, in the judgment of the assignees, "*to the interest of the creditors of said bank*;" *held*, that the assignment was not vitiated by such a provision, and the power might be exercised. *Ib.*

13. Where a bank, with a railroad attached, in an assignment of its effects, made the assignees the joint agents of the bank and its creditors, in the management of the road, the agents of the bank and in the receipt and disbursement of its profits, the agents of the creditors; *held*, that the provision in the assignment gave the bank no control over the assignees, and did not avoid the assignment. *Ib.*

14. A railroad built by an incorporated company, for public travel and transportation, is a mere *fanchise*, and not assignable by the company. *Ib.*

15. In an assignment, by a bank, of its effects, a provision prohibiting the assignees from paying any claims until their validity has been tested in a mode pointed out in the assignment; *held*, not to avoid the assignment. *Ib.*

16. Where, in a deed of assignment of its property, a bank conveyed in general words, *all its effects*; *held*, that the omission to annex a schedule of the property assigned is no objection to the validity of the assignment. *Ib.*

17. In a deed of assignment by a bank, a covenant, on the part of

the assignees, to exhibit periodically a statement of their accounts to the board of directors, is no objection to the validity of the assignment. *Ib.*

18. Where a deed of assignment, by an incorporation, of its effects, for the payment of its debts, is void in part, it is void *in toto*. *Ib.*

19. A provision in a deed of assignment, by a bank, requiring the assignees “*to pay all the necessary expenses of the president, directors and company of the bank, in the management of the corporation,*” held, not to be such a reservation for the benefit of the grantor, as will make the assignment void *upon its face*; the fund assigned for the payment of the debts being not only of a limited and definite amount, but also of an indefinite assignment of annually accruing profits; and the reservation not appearing to be for any fraudulent purpose. *Ib.*

See, also, *Fraud and Fraudulent Conveyances, and Trust and Trust Deeds.*

ASSIGNOR AND ASSIGNEE.

1. The assignee of an open account may sue on it for his own use, in the name of the assignor; nor is that right affected by the subsequent insolvency and bankruptcy of the assignor, and judicial transfer of his effects to his creditors. *Defrance v. Davis*, Walk. 69.

2. The statute of this state, rendering notes and sealed instruments negotiable, does not embrace open accounts; it is similar to the statute of Ann, rendering notes negotiable, except in protecting the rights of a *bona fide* assignee; our stat-

ute in that particular leaves such assignee on the same footing as the assignee of open accounts. *Ib.*

3. The assignee of an unfounded or falsely represented claim may recover of the assignor the costs expended in its prosecution. *Cartwright v. Carpenter*, 7 How. 328.

4. The assignee of a note takes the place of the assignor, and is affected by his frauds in connection with it. *Barringer v. Nesbit*, 1 S. & M. 22.

5. The statute of this state making certain choses in action assignable, and authorizing suits in the name of the assignee, does not apply to judgments; the assignee of a judgment cannot therefore bring a suit in his own name on that judgment, or to recover damages for an obstruction of his right to enforce it; and the same rule will apply to a purchaser of a judgment belonging to a bankrupt from the assignee in bankruptcy; the suit should be brought in the name of the bankrupt, or of his assignee in bankruptcy. *Wilson v. McElroy*, 2 S. & M. 241.

See *Bills of Exchange and Promissory Notes, passim.*

ASSUMPSIT.

1. An action for money had and received, will lie in all cases where the defendant himself has come to the possession of plaintiff's property by permission of the law, and has himself raised a sum certain by the sale of it. Courts are inclined to extend the action of *indebitatus assumpsit* to attain the ends of justice. *Glass v. Lobdell*, Walk. 105.

2. See *Evidence*, 25, as to what evidence admissible under count for work and labor; and how far special contract may be abandoned and prove under the common counts.

3. In an action *ex contractu* the verdict and judgment must be alike against all or none. *Jones v. McGahey*, 1 How. 128.

4. In actions of assumpsit where there were a plea of general issue and one of payment, and the jury found for plaintiff on the general issue, but gave no verdict on the plea of payment; *held*, that the verdict was good; the finding on the general issue showed a failure on the part of the defendant to uphold his plea of payment, and the omission to find on that plea was formal merely, and immaterial. *Chewning v. Cox*, 1 How. 130. *Sed aliter*; the judgment will be erroneous if the plea of payment be not answered or otherwise disposed of. *Price v. Sinclair*, 5 S. & M. 254.

5. Where assumpsit is brought upon a special agreement, and the common counts are added, the plaintiff cannot recover upon either, if he prove a special agreement different from that declared on; unless the case be such that if there had been no special contract, he might still have recovered for money paid, or work and labor done; or unless where a specific sum is due by special agreement fully executed. *Fowler v. Austin*, 1 How. 156.

6. If the verdict and judgment in assumpsit be for a greater sum than the damages laid in the declaration, it will be error. *Potter v. Prescott*, 2 How. 686.

7. Where assumpsit is brought on a sealed instrument, the error is

cured by verdict and the plea of non assumpsit is a proper plea. *Dixon v. Richards*, 2 How. 771.

8. See *Account*, 5, for the character of account which the statute requires the plaintiff shall file with his suit.

9. An action of assumpsit for money had and received, cannot be maintained against a party to recover the amount of notes of third persons, and open accounts and officers' receipts left with the defendant for collection by the plaintiff, without proof that the defendant actually received the money from them. *Fox v. Fisk*, 6 How. 328.

10. Where a sum of money is by mistake of an agent of the holder, credited on a note, and the holder of the note, supposing it paid, delivers it up to the maker, such agent who has made the mistake, and has been compelled to rectify it with the principal, may recover back from the maker, in an action for money had and received, the amount thus paid in mistake. *Bank of Louisiana v. Ballard*, 7 How. 371.

11. An action for money had and received will lie against a mere intruder or trespasser who has collected money which belonged to another; as where a party having no right to wharfage has, without authority, collected it, the true owner may sue him in assumpsit for it. *O'Conley v. the City of Natchez*, 1 S. & M. 31.

12. Where profits have been received by injury done to real property, the owner may waive the trespass and sue in assumpsit. *Ib.*

13. Under the money counts in assumpsit against a bank, the notes of such bank can be offered in evidence. *Hughes v. Grand Gulf Bank*, 2 S. & M. 115.

14. In an action of indebitatus assumpsit for work and labor, against an administrator, the promise by the intestate was laid long after his death; *held*, the time was immaterial. *Hill v. Robeson*, 2 S. & M. 541.

15. See *Contract*, 48; a laborer who has contracted to do a job, cannot abandon it and recover in assumpsit for what he has done.

16. In an action of assumpsit where the declaration contains a special count, and also the common counts, so long as the special contract remains in force, the plaintiff cannot resort to the common counts, unless he fail altogether in proving the special contract, and then it must be such a transaction as would enable him to recover on the money counts, if there had been no special contract; but if there be any proof of the special contract, he cannot recover; and where the contract is special and the payment of the money, and the delivery of the things sold are concurrent acts, it is incumbent on the party suing for the breach of the contract, to aver and prove his offer to perform his part; but if the special contract has been rescinded by mutual consent, or abandoned by the defendant, an action may be maintained by the other party for money paid on the contract; yet the abandonment of the contract must precede the action brought, for if the contract is in force at the trial the plaintiff cannot, at his option, abandon the contract and sue for the money paid; where, therefore, J. paid M. a certain sum in part payment of his crops of cotton, and agreed to pay the balance on delivery of the cotton, and M. tendered the cotton to J., and demanded the residue of the price,

which J. could not pay, when M. sold his cotton to a third party, whereupon J. sued M. to recover the sum he had paid on the cotton; *held*, that J. could not, at the trial, abandon the special count and recover on the common counts for money paid A.; nor could he recover on the special count, without showing a readiness to pay for the cotton when delivered, but if M. had abandoned his part of the contract, before J.'s failure to comply, J. might sue for and recover back the money. *Morrison v. Ives*, 4 S. & M. 652.

17. An action of assumpsit upon an open account, is not embraced in the words action on the case, used in the statute H. & H. 572, §104, which provides that in all actions on the case &c., if the jury find under ten dollars the court shall not adjudge a greater amount of costs, except in the contingency provided by the statute. *Fletcher v. Benbrook*, 5 S. & M. 619.

18. Where a declaration contains a count upon a special contract, and also the common counts, and the plaintiff fails wholly in his right to recover on the special count, he may recover on the common counts, provided the case be such that if there had been no special contract, he might still have recovered under the common counts: where therefore G. brought an action against H. P. upon an award, by which, among other things, H. P. was directed to pay G. \$1790; and the declaration also contained another count that H. P., in consideration that G. would deliver to him two notes made by H. P. and others, and owned by G., he (H. P.) would pay G. \$1790, with the averment of the delivery of the notes to H. P.; *held*, that even though G. should

fail in his count upon the award, on the ground that the award was void, he might still recover on the second count, if it was sustained by the proof. *Gibson v. Powell*, 5 S. & M. 712.

19. In an action by a physician to recover fees due him, it is not necessary that all the items of his account should be strictly proved; where, however, the proof of the various items is not clearly made out the physician would strengthen his proof by showing that he kept correct books, and that the account was correctly copied from his books. *Hazlip v. Leggett*, 6 S. & M. 326.

20. L., a physician, sued G.'s administrators for medical services rendered G. extending from 1836 to 1842; and proved by Dr. M. that he (L.) had attended in the family of G. as physician during his (M.'s) absence, who was G.'s regular physician; that he knows nothing of the particular visits or prescriptions charged, but had seen L. two or three times at the house of G.; that he had heard G. in his lifetime frequently say that in the absence of witness he had employed L.; and he had two or three times been called in consultation with L. at G.'s house over some of his sick family; *held*, the evidence was not sufficient to entitle L. to recover. *Hazlip v. Leggett*, 6 S. & M. 326.

ATTACHMENT.

1. See *Judgment*, 1. A judgment by attachment not evidence in another action. *Chew v. Randolph*, Walk. 1.

2. A judgment obtained in Louisiana by attachment, binds only the attached property. *Woolfolk v. Cage*, Walk. 301.

3. A party may proceed by attachment in this state to recover damages for breach of covenant. *Ib.*

4. See *Garnishment*, 2, 3 and 4; as to how far assignee of note is preferred to garnisheeing creditor; and also the duty of garnishee to protect the rights of both parties; and the effect of sale of attached property.

5. A justice of peace has no power to order attached property to be delivered to the plaintiff in the attachment; such order will be void and no defence to an action of trover for the property. *Welch v. Jamison*, 1 How. 160.

6. An attaching creditor cannot coerce payment of garnishee, without first executing a bond, according to the statute, and if the garnishee pay the attaching creditor without such bond it will be voluntary and no bar to a suit on the original debt by the defendant in the attachment. *Grissom v. Reynolds*, 1 How. 570.

7. Where the party defendant to a suit on a note pleaded that he had paid it to an attaching creditor of the payee and issue was taken on the plea, *held*, that the plaintiff could show that the payment was improperly and illegally made. *Ib.*

8. Where an attachment, perfectly regular on its face, was quashed by the court below, and the reasons for the quashal were not spread on the record, it will be presumed to have been properly done for matter *dehors* the record. *Cobb v. O'Neal*, 1 How. 581; *Tyson v. Hamer*, 2 How. 669.

9. The judgment against a garnishee is based on the proceeding in attachment, and on appeal from such a judgment this court will look into the regularity of the attach-

ment proceedings. *Berry v. Anderson*, 2 How. 649.

10. A judgment against a garnishee, whose answer states an indebtedness not due, without a stay of execution until the maturity of the debt, is irregular. *Ib.*

11. It is no objection to a judgment in attachment that the plaintiff therein hath not given the bond to restore the property as required by the statute; as the statute requires the bond only after execution. *Ib.*

12. Where the amount claimed by the attaching creditor was \$70 84, and the garnishee admitted an indebtedness of \$98 37, a judgment in these words: "It is ordered by the court that judgment final by default be entered against the garnishee for the amount of his answer or so much thereof as will satisfy the plaintiff's debt and costs, and that the plaintiff have execution for the same," is void for uncertainty. *Ib.*

13. An attachment process, without bond and affidavit, is absolutely void. *Ford v. Hurd*, 4 S. & M. 683; and the defect is not cured by the appearance and plea of the defendant. *Tyson v. Hamer*, 2 How. 669; and a judgment against a garnishee under such attachment, who has answered, will be also void. *Ford v. Woodward*, 2 S. & M. 260; and would be no bar to a subsequent action against the garnishee for the same debt. *Ford v. Hurd*, 4 S. & M. 683.

14. An attachment for rent, without bond and security, by the landlord, is erroneous. *Cornell v. Rulon*, 3 How. 54.

15. See *Seal*, 1, for what sufficient seal to writ of attachment.

16. See *Replevin*, 4, as to whether the papers in attachment for rent, need be returnable to the cir-

cuit court; and for proceedings on three months' replevin bond.

17. Where the statutes in reference to proceedings in attachment in one section provided that the attachment bond should be "conditioned for satisfying all costs which should be awarded the defendant, in case the plaintiff suing out the attachment should be cast in the suit, and also all damages which should be recovered against the plaintiff for wrongfully suing out the attachment," and in another section the legislature prescribed the form of the bond and its condition, which was that "if the plaintiff failed to prosecute his suit with effect he should well and truly pay and satisfy all such costs and damages as should be awarded against him in any suit or suits which might thereafter be brought for wrongfully suing out the said attachment;" held, that the statutory bond must be followed, and attachment bonds not following it, but conditioned as in the first section, would be void. *McIntyre v. White*, 5 How. 298; *Amos v. Allnutt*, 2 S. & M. 215.

18. It is not necessary for the agent, who takes out an attachment, to swear to the fact of his agency; the certificate of the justice is sufficient evidence of it. *Lindner v. Aaron*, 5 How. 581.

19. It is not necessary that the citizenship of the plaintiff in the attachment should be stated in the record. *Ib.* *Foster v. Cook*, 7 How. 357. The defence of non-residence should be made by plea, if it exist. *Amos v. Allnutt*, 2 S. & M. 215.

20. Where an attachment bond was signed by an agent, the court will not therefore quash the attachment; it will presume the justice required legal authority to sign the

bond ; the utmost to which the court would go in such case would be to make a rule upon the party to produce the power of attorney in a reasonable time. *Ib.* On motion to dismiss the attachment the court cannot look beyond the face of the bond itself ; if therefore the bond be signed by A. as agent for the attaching creditor, and be in other respects regular, the court will not, on the motion to dismiss, inquire into the agency of A. *Spear v. King*, 6 S. & M. 276.

21. See *Garnishment*, 7 and 8 ; where debt garnisheed is not due, and where partners are garnisheed and one only answers.

22. Where a defendant in an attachment has replevied property attached he may still move to quash the attachment, or he may file a plea in abatement ; but he must do so before the time, when, by the rules of the court the issue must be made up ; by replevying the property he acknowledges notice of the suit and is subject to be proceeded against as in other suits. *Wilkinson v. Patterson*, 6 How. 193.

23. An affidavit for an attachment against an absconding debtor, which alleges that the affiant has good grounds to believe and does believe that the defendant *hath absconded* &c., is a sufficient compliance with the statute which uses the language, *so absconds*, &c. ; the precise language of the statute need not be used. *Wallis v. Wallace*, 6 How. 254 ; the words "*is about removing himself out of the limits of said state, so that, &c.*", are sufficient. *Lee v. Peters*, 1 S. & M. 503.

24. When one of the members of a firm acting for himself and his partners sues out an attachment against an absconding debtor, a bond signed by such partner alone,

with sureties, will be as valid as if all the partners had signed it. *Ib.*

25. A judgment in attachment against a non-resident will be erroneous if rendered before publication for six months. *Saffaracus v. Bennett*, 6 How. 277.

26. An affidavit in attachment must state that the defendant so absconds that the ordinary process of the law cannot be served on him. *Thompson v. Raymon*, 7 How. 186.

27. Where the defendant in attachment replevies the property by giving bond and surety, the obligors therein can only be made liable either by action of debt or *scire facias* on the bond. *Ib.*

28. After the defendant has replevied property attached and has suffered judgment to go by default against him he cannot object to defects in the attachment itself. *Ib.*

29. Where an attachment at law was sued out against two members of a firm, the third member not being sued and persons were summoned as garnishees who answered admitting an indebtedness to the firm generally, and it did not appear what were the respective shares of each partner ; *held*, that a judgment against the garnishees would be erroneous. *Mobley v. Lonbat*, 7 How. 318.

30. Where an agent for the plaintiff in attachment gives a bond in his own name with sureties, binding himself individually and not purporting to bind his principal, it will be a good bond under the statute. *Frost v. Cook*, 7 How. 357 ; *Page v. Ford*, 2 S. & M. 266 ; yet it must appear either by the recital in the bond or the signature that he acted as agent ; otherwise the bond of a third party will not uphold the attachment. *Ford v. Hurd*, 4 S. & M. 683.

31. The act of 1840, which abolished imprisonment for debt, in effect repealed that portion of the attachment law, which required the defendant in an attachment, before he could discharge the attached property, to appear, *give special bail* and plead; the necessity of giving special bail is dispensed with, and the defendant, by appearance and plea merely, will discharge the attached property. *Garrett v. Tinnen*, 7 How. 465; *Rowley v. Cummings*, 1 S. & M. 340.

32. It seems that since the act of 1840, abolishing the taking of bail, &c. a special bail-bond in attachment for a debt due, is void. *Ib.* Yet if, when an attachment is issued and levied, a third party execute a bond to the plaintiff in the attachment that if the defendant do not appear and pray the judgment of the court, he would, and the bond be designed as a contract to that effect between the parties, the obligee may recover thereon, but if it be designed as a special bail-bond he cannot recover. *Emanuel v. Laughlin*, 3 S. & M. 342; and to an action on such a bond the plea that the defendant in attachment was amenable to the process of the court and was not arrested by *ca. sa.* is bad. *Ib.*

33. Where the debt for the recovery of which the attachment is sued out was not due, the statute on the subject provided that "if the debtor shall not on or before the return of the attachment, enter into bond with sufficient security for the payment of the debt when it becomes payable," the court shall, on proof of the debt and of the intention to remove, grant judgment; and it also provided that such attachments should also be replevable as in other cases of attachment,

held, that the law of 1840 repealed the last proviso which authorized a replevy by giving special bail, and that therefore where there was an attachment for a debt *not* due, it could only be replevied by a bond to pay the debt when it was due, *which* could be given at any time before final judgment. *Ib.*

34. Where an attachment issues for a debt not due the defendant should not be allowed to plead until he has given bond for the payment of the debt sued for. *Ib.*

35. Where the statute allowed an attachment to issue on the affidavit of the plaintiff that he had just cause to suspect and verily believe that his debtor will remove &c.; it was *held* to be a bad plea in abatement of the attachment that the defendant did not *intend to remove*. *Ib.*

36. It seems that a plea in abatement in an attachment case will lie only for irregularity in the affidavit, the attachment process or the bond. *Ib.*

37. See *Evidence*, 224; when surety in attachment bond competent witness for plaintiff.

38. Under the statutes of this state a judgment creditor may garnish the *judgment* debtor of his debtor; it is no objection to the writ of garnishment, that the judgment debtor will be subject to two executions; he has his remedy. *Gray v. Henby*, 1 S. & M. 598.

39. An attachment at law cannot be sued out in this state by a *non-resident* plaintiff against a *non-resident* defendant; it is different in chancery under a different statute. *Hosey v. Ferriere*, 1 S. & M. 663; but the defence must be made by plea; the citizenship need not appear of record. *Amos v. Allnutt*, 2 S. & M. 215.

40. The affidavit in attachment omitting the words "so that the ordinary process of the law cannot be served on him" is fatally defective. *Page v. Ford*, 2 S. & M. 266.

41. An attachment is not vitiated because the signature of the creditor is not placed to the affidavit of the indebtedness of the defendant and his non-residence. *Redus v. Wofford*, 4 S. & M. 579.

42. Where the sheriff levies an attachment upon real estate and returns the writ *executed*, without setting forth the manner of the service or showing that he pursued the directions pointed out by the statute, it will be sufficient; the court will presume the attachment to have been regularly executed. *Ib.*

43. An attachment upon land is a lien from the time of its levy; therefore in a controversy between a purchaser under an attachment sale and one under an execution sale of real estate of the same defendant in each proceeding, the purchaser at the attachment sale will take it if the levy of the attachment was anterior to the judgment under which the execution purchaser bought, even though the judgment in the attachment was junior. *Ib.*

44. After judgment on inquiry of damages, in an attachment suit, it will not affect the validity of the subsequent proceedings that the attachment was for unliquidated damages and the declaration in trover; the defect is cured by the statute of jeofails. *Ib.*

45. The statute requiring the plaintiff in attachment, or his agent, to give bond with sureties, is not complied with by the execution of a bond by a single person, in no way connected with the attach-

ment. *Ford v. Hurd*, 4 S. & M. 683.

46. A plaintiff in attachment who has given bond on suing out the attachment, obligating himself to pay the costs of the attachment suit, cannot be required to give any other security for costs, until the surety in the bond shall be adjudged insufficient. *House v. Bierne*, 5 S. & M. 622.

47. An affidavit to procure an attachment, which avers that the debtor is concealing his goods, will not be vitiated by containing the reason of the creditor's belief of that fact; therefore an affidavit that the debtor "had conveyed to his brother most of his tangible effects, was greatly in debt for goods purchased as a merchant; that these debts were pressing him; that he had conveyed these goods to his brother, a man of little property or responsibility, but lately come to the state, having no permanent residence in it, and soon expected to leave; that some of the goods had been boxed up, and the debtor and his brother contemplated moving themselves out of the state in a short time, and that by this means the debtor was concealing his effects so that the claim of the creditor would be defeated in the ordinary course of law," is sufficient. *Spear v. King*, 6 S. & M. 276.

48. An affidavit to procure an attachment, stating that the "defendants are concealing their effects so that the ordinary process of the law cannot be served on them, and that the claim against them will be defeated," &c. is sufficient. *Lovely v. Harkins*, 6 S. & M. 412.

49. If the process in attachment, by mistake of the justice, recited that the *plaintiffs* were concealing their effects, &c., instead of the *de-*

fendants, and the bond and affidavit contained correct recitals, the court will look to the whole record, and not construe it so as to defeat its own end. *Ib.*

50. To authorize the issuance of an attachment against the property of a non-resident of this state, under the statute H. & H. 550, § 16, it is not necessary that the affidavit should state the actual place of residence of the defendant; it is sufficient if it state his non-residence and the impossibility to serve the ordinary process of law. *James v. Dowell*, 7 S. & M. 333.

51. In a case commenced by attachment the defendant has a right to plead in abatement, when he appears and replevies the property attached. *Ib.*

52. A plea in abatement to attachment, which alleges that the defendant is a citizen of the State of Mississippi, but does not state that he resides in the county in which the suit is instituted, and thus show that the ordinary process of the law could have been served on him, is bad. *Ib.*

53. The pendency of one attachment may be pleaded in abatement of a subsequent attachment between the same parties, for the same cause of action, in the same county. *Ib.*

ATTACHMENTS IN CHANCERY.

1. The Statute on the subject of foreign attachments fully authorizes any creditor, with or without a judgment at law, who can bring himself within the provisions of the statute, to file his bill and obtain relief under the statute. *Comstock v. Rayford*, 1 S. & M. 422.

2. On a creditor's attaching bill

under the foreign attachment law, the court cannot, *at the filing of the bill*, order an attachment to issue against the property in the hands of the resident defendant; that order can only be made when the home defendant has been served with process and *at the return term* an affidavit is made of the absence of the other defendant; the court may then make an order for the safe keeping of the effects and their production to answer the decree. *Ib.*

3. A non-resident may sue out in chancery an attachment against a non-resident defendant; but he cannot at law. *Hosey v. Ferriere*, 1 S. & M. 663; whenever the non-resident defendant has *lands* in this state, those lands may be proceeded against in the superior court of chancery in the mode pointed out by the statute, by a non-resident complainant, even though there be no home defendant; but in such case the terms of the statute as to notice must be strictly complied with; mere publication in the newspaper will not do, it must also be posted at the court house door; and where the former only is done the bill will be dismissed without prejudice. *Zecharie v. Bowers*, 3 S. & M. 641.

See *Chancery*, tit. *Attachments in Chancery*.

ATTORNEY AT LAW.

1. An attorney at law, who, without express authority from his client, compromises a claim for less than the whole sum due, cannot be proceeded against by his client by motion, for the sum given up by the compromise; the client must resort to another remedy; — but if the at-

torney in such case refuse to pay over the money actually received unless the client will give a receipt in full for the whole claim, the client may recover, on motion, from the attorney the sum actually received. *Lombard v. Whiting*, Walk. 229.

2. An attorney's receipt for the collection of money cannot be assimilated to a bill of exchange so as to require of the assignee demand and notice. *Runnels v. Spencer*, Walk. 362.

3. In an action on an attorney's receipt, the holder must show that the attorney had received the money by suit on the claim he had receipted for, or that it had been lost by his omission or negligence. *Ib.*

4. See *Judgment*, 14, as to power to assign judgment.

5. Depositions in hand-writing of attorney not excluded. *Donoho v. Pettit*, Walk. 440.

6. See *Waiver*, 1. How far appearance by attorney, waiver of defect in process.

7. An attorney at law can only be moved against under the statute for money actually collected; if he take other notes and claims in satisfaction of his client's debt from the debtor, without authority, he will be liable, but not by motion. *Banks v. Cage*, 1 How. 293.

8. The high court of errors and appeals has power to strike the name of an attorney at law from the rolls for unprofessional conduct; such as obliterating a record or antedating a writ to avoid the statute of limitations. *Ex parte Brown*, 1 How. 303.

9. The admissions by an attorney at law of payments made to him, are binding on his client. *Wenans v. Lindsay*, 1 How. 577.

10. But the agreement of an attorney to credit his client's claim

with a debt due by the attorney to the client's debtor, will not bind the client. *Ib.*

11. See *New Trial*, 16 and 17, when negligence of, ground for new trial.

12. The attorney at law, who has obtained a judgment on which the sheriff has collected the money, cannot move against the sheriff in his own name, to compel him to pay over such money in discharge of general balances due the attorney as such by his client. *Harney v. Demoss*, 3 How. 174.

13. If an attorney at law neglect to bring a suit on a claim placed in his hands for collection, whereby the debt is lost, the attorney will be liable for it. *Fitch v. Scott*, 3 How. 314.

14. An attorney at law has no authority to compromise the claim of his client; and if he do so he takes upon himself the consequences of its loss or the damage his client may sustain. *Ib.* So also he has no power to take an assignment of one judgment in satisfaction of another, without special authority. *Clark v. Kingsland*, 1 S. & M. 248.

15. Where an attorney surrenders up his client's claim to the debtor, the presumption of law, in the absence of proof to the contrary, will be, the total loss of the debt to the client. *Ib.* 3 How. 314.

16. Where the justice of the case requires it, attorneys will be compelled to produce their authority for prosecuting the suit; as where a suit was brought in the name of M. and A. against P., and P. made oath that the note sued on belonged to M. alone, that A. had no interest in it, and that the suit was so brought to prevent an offset that P. had against M.; *held*, that the attorneys who brought the suit must show

their authority from A. to join him in the declaration. *McKeirnan v. Patrick*, 4 How. 333. A power of attorney from the plaintiff will be sufficient authority and discharge the rule. *Anderson v. Patrick*, 7 How. 347.

17. An act of the legislature prohibiting directors of banks from being attorneys in suits for such banks, is not a violation of the constitution securing to all persons the right to be heard in court by themselves or counsel. *West Feliciana Railroad Co. v. Johnson*, 5 How. 273.

18. See *Partners*, 11; how far one partner in the practice of the law bound by notice to his co-partner.

19. It is error to strike an attorney from the roll without giving him notice of the proceeding, actual or constructive. *Ex parte Heyfron*, 7 How. 127.

20. An attorney at law cannot enforce his lien on a decree for the payment of money rendered in the probate court, in that court; his lien must be elsewhere enforced. *Clarke v. Ratcliffe*, 7 How. 162.

21. An action for money had and received is not the proper remedy against an attorney for collecting depreciated bank notes; case would be more appropriate. *Kellogg v. Budlong*, 7 How. 340.

22. An attorney at law is bound, in the absence of injunction, to pay over the money collected on execution to the plaintiff in execution, and if he fail to do so, and is moved against therefor, it will be no answer to the motion that he had received notice from a third person who claimed to own the money, not to pay it over to the plaintiff in execution. *Dunn v. Vannerson*, 7 How. 579.

23. An attorney at law has no lien upon a judgment obtained by him for anything but his fees in that particular suit; he has no lien for general accounts. *Ib.*; or fees for services rendered in other cases; though perhaps he may have upon *papers* in his hands. *Pope v. Armstrong*, 3 S. & M. 214; *Cage v. Wilkinson*, 3 S. & M. 223.

24. An attorney at law who has obtained a judgment for his client, is but the agent of his client and cannot by any instructions to the sheriff justify the sheriff in refusing to pay over money collected on execution to the plaintiff therein; such attorney's fee being first paid. *Dunn v. Newman*, 7 How. 582; a payment to the attorney however will always discharge the sheriff unless he be *positively prohibited* from paying it to him. *Butler v. Jones*, 7 How. 587.

25. It is incompetent to prove a custom among the attorneys at law to take full and complete control over the business of foreign clients and to exercise discretionary power in its settlement, in violation of principles of law, or contrary to the interests of their clients. *Clark v. Kingsland*, 1 S. & M. 248.

26. See *Evidence*, 225; when an attorney at law under acceptances for his client is competent witness for him.

27. An attorney at law, who has obtained a judgment in favor of his client against his own creditor, has no right, by an agreement with his creditor, to credit the executor with the amount of his own indebtedness in discharge of that indebtedness; such agreement is void; nothing but a payment in money, without the consent of the plaintiff, will satisfy his execution. *Keller v. Scott*, 2 S. & M. 81.

28. An attorney at law, has no right to take bank notes in payment of an execution. *Gasquet v. Warren*, 2 S. & M. 514. See *Execution*, 25.

29. Where the name of an attorney was marked to a case on the court docket as attorney for the defendant; and the clerk of the court testified that the attorney's name was in his (the clerk's) handwriting, and that he never made such entries without directions from the attorneys; *held*, in an action against the attorney for neglect in that case, to be questionable evidence of retainer of the attorney by the defendant. *Grayson v. Wilkinson*, 5 S. & M. 268.

30. If an attorney be employed to defend a suit, and fail to do so, he is liable to the party injured to the extent of damages actually suffered; if, however, the attorney can show that the defence he was employed to make was not a good one, he would be liable, at most, only to nominal damages. *Ib.*

31. An attorney at law, who has collected money for his client, will, if he deliver it to a third person to carry to his client, without authority or directions from the client so to do, be liable to his client for the sum thus collected, if the same be stolen from such third person while on his way with the money, even though such person were trustworthy, and took the same care of his money that he did of his own. *Ib.*

32. W., an attorney at law in Mississippi, collected some money for S. of Louisiana, and notified him of it, and requested him to draw at sight for the sum; S. accordingly did so, but the bill was protested, in consequence of W.'s

absence; whereupon W. sent the money to S. by E., a trustworthy man; the money was stolen from E. while on his journey, together with some of his own: *held*, that the bill of exchange drawn on W. by S. was a direction to W. to pay the money in that way, and if he adopted any other mode it was at his own risk. *Ib.*

33. If an attorney be employed to defend a suit, and fail to do so, by which judgment is rendered against his client; before he can be made liable for the amount of the judgment thus recovered, it seems that he must have been informed by his client, what was the nature of the defence he was expected to make. *Ib.*

34. The receipt of an attorney at law for a note placed in his hands for collection is not negotiable, either by the common law or statute; and if it be assigned to a third party, without the consent of the holder of the note, and the attorney, with knowledge of that fact, pay the money to the assignee of his receipt, he will be liable to pay it over again to the holder of the note. *Roberts v. Bean*, 5 S. & M. 590.

35. Where an attorney at law was sued for damages occasioned by his failure to sue one of the parties to a note placed in his hands for collection, it will be a good plea in bar of the action, that the attorney at law sued one of the makers of the note in due course of law and recovered a judgment against him, which bound a sufficient amount of unincumbered property to pay the debt, and that satisfaction would have been obtained of the judgment, but that the plaintiff, by his own act, surrendered up and vacated it.

Ransom v. Cothran, 6 S. & M. 167.

36. The authority of an attorney upon a general retainer to collect money extends no further than to receive the amount in legal currency; if he accept anything else without special authority, the client may refuse to acknowledge it as a payment, and may, where there is a judgment, re-issue the execution; where, therefore, an attorney at law received of his client's judgment debtor the notes of third persons, and receipted for them as cash to the debtor, the creditor, it was *held*, might still proceed with the execution against the debtor, unless the debtor could show that the attorney was authorized to make the arrangement; and the attorney's statements at the time that he was so authorized will not be evidence of such authority; especially where the attorney in his deposition states that he has no recollection of having had a special authority. *Garvin v. Lowry*, 7 S. & M. 24.

37. Before a client can be held by acquiescence therein to have ratified the act of his attorney, which was beyond the scope of his authority as such, it must be shown that the act was made known to him, and what course he adopted when informed of it. *Ib.*

38. Where A. employed B. as attorney at law to collect a debt against C., and B. brought suit against C., whereupon C. placed collateral paper in B.'s hands, of

which collateral B. collected a portion, and went off to Texas with it; *held*, A., not having received or authorized its reception, the loss must fall on C. *McLaughlin v. Clark*, Freem. Ch. 385.

39. An attorney at law has no right to receive bank paper depreciated, in satisfaction of an execution. *Osgood v. Brown*, Freem. Ch. 392.

40. The transfer of an attorney's receipt for a claim in his hands for collection, vests in the assignee an equitable right to the proceeds of the claim. *Anderson v. Miller*, 7 S. & M. 586.

AUDITA QUERELA.

1. See *Execution*, 1 and 2, as to when the writ of *audita querela* lies. *Hicks v. Murphy*, Walk. 66.

2. All the defendants in a judgment must unite in a writ of *audita querela*, or it will be dismissed. *Melton v. Howard*, 7 How. 103.

AUDITORS.

See *Chancery*, tit. *Accounts*, as to practice before. Walk. 43.

AWARD.

See *supra*, tit. *Arbitration and Award*.

B.

BAIL.

1. See *Attachment*, 31, 33; for effect of law abolishing bail, on attachment law.

2. Where the condition of a bond is to do a thing which has been rendered impossible and illegal, the obligor is discharged; where, therefore, by act of the legislature of 1822, authorizing arrests for debt, it was provided, that the bail should have the liberty, at any time before the return of the first *scire facias*, or before final judgment, of surrendering up his principal in his discharge; and the statute of 1839 prohibited the arrest or imprisonment of any defendant, on either *mesne* or final process; *held*, that the obligors in a bail bond, executed before the act of 1839, but the condition of which had not been forfeited until after, were discharged from their obligation; for the right of the bail to surrender the principal being taken away by the statute, his liability is also gone. *Brown v. Dilahunty*, 4 S. & M. 713.

BANK OF MISSISSIPPI.

The Bank of Mississippi cannot proceed by the mode pointed out in its charter, for suing on paper payable *at the bank*, against an indorser on a note payable at one of its *branches*. *Bank of Mississippi v. Bush*, Walk. 265.

BANKS AND BANK NOTES.

1. See *Criminal Law*, tit. *Larceny*; as to how far bank notes are subjects of larceny.

2. See *Execution*, 25; as to payment of execution in bank notes.

3. See *Attorney at Law*, 17; act of the legislature prohibiting directors of banks from being attorneys not unconstitutional.

4. The act of 1840, which required the banks in this state to pay specie under penalty of forfeiture of their banking powers and privileges in case of failure, and providing that after forfeiture a bank might retain and use its corporate name for the purpose of winding up and liquidating its affairs, did not prohibit a bank which had subjected itself to the penalty, from suing upon its notes and bills receivable. *Campbell v. Mississippi Union Bank*, 6 How. 625.

5. The constitution of the state prohibited any law to raise a loan of money on the credit of the state or to pledge the faith of the state unless such law was passed by one legislature, entered on the journal of each house with the yeas and nays taken on it, referred to the next legislature, published for three months previous to the next regular election, and passed by a majority of the next legislature; in the Union Bank charter, when first passed, the faith of the state was pledged for a certain sum

in a certain way ; at the next legislature a supplement to the charter was passed, making no alteration in regard to the pledge of the faith of the state, but altering merely the details of the original charter, and the mode of putting the bank in operation ; *held*, that the supplemental act was not a violation of the constitution. *Ib.*

6. The charter of the Union Bank, pledging the faith of the state, was first passed on the 21st of January, 1837 ; it was referred to the next legislature, and on the 5th of February, 1838, the original act, as first passed, was repassed without change ; but on the 15th of February, 1838, a supplemental act was passed, changing, in some particulars, the original act ; the bank went into operation, and sued certain of its debtors, and they plead the unconstitutionality of the supplemental charter ; *held*, that if the supplement was unconstitutional, it was void and could not affect the validity of the charter, which became complete on the 10th of February, A. D. 1838 ; and that, therefore, the bank had a right to sue. *Ib.*

7. If a bank have power to issue paper for circulation, and there is no limit in the charter as to the kind of paper to be issued, it may issue post notes, and when issued, they may circulate as money. *Ib.*

8. The defendants to a suit brought by the Mississippi Union Bank, on a note payable to it, plead that the stockholders to the bank refused to receive certain state bonds, the issuance of which was provided for in the charter, that they were in fact not stockholders, and had surrendered the charter ; *held*, that the plea was repugnant and contradictory ; and even if true in all its parts, the state being a

stockholder, the bank might nevertheless sue, even if there were no other stockholders. *Ib.*

9. A plea to a suit by the Union Bank that the note sued for, was given for a loan of post notes which had on them "*the faith of the state pledged*," when the bank had no right to pledge the faith of the state ; *held*, that the plea would not be a good bar to the action, not alleging that defendant was defrauded or deceived by the statement, and the bank having no power, as was well known to the defendant, to pledge the faith of the state. *Ib.*

10. Where a charter to a bank contained a provision authorizing the issuance of certain state bonds, which could only issue on certain conditions, the non-performance of those conditions would only affect the provisions of the charter touching them, but would not destroy the validity of the residue of the charter ; which would be a complete act of incorporation without such provision for the issuance of state bonds. *Ib.*

11. Where the makers of a note discounted by a bank, took, instead of money from the bank, a certificate of deposit with the bank, and afterwards, with that certificate, bought bank stock in a branch of such bank ; the bank will be entitled to recover upon the note. *Mississippi Railroad Co. v. Scott*, 7 How. 79.

12. Where a note is payable to a bank, the stock of the bank held by the maker of the note is no offset to the note ; but it may be made so by contract between the maker and the bank ; but a single director would not have power to make such contract. *Harper v. Calhoun*, 7 How. 203.

13. A letter to the cashier of a

bank by one of its debtors who was also a stockholder, requesting the cashier to ascertain whether the bank would take his stock towards the payment of his debt, is not a contract, to take such stock in payment; even though the bank may express its assent to do so in response to the letter. *Ib.*

14. Where in a suit by the assignee of a note payable to a bank, the defendant plead payment, and offered as proof under the plea, that he was owner of stock in the bank, and that the bank was *in the habit* of taking stock in payment of debts due to it; *held*, that the testimony was illegal: the existence of such custom did not amount to a contract. *Ib.*

15. Where bank notes are plead as an offset, they must be filed with the plea. *Ib.*

16. A bank may assign notes payable to it by indorsement of the cashier. *Ib.* and *Crockett v. Young*, 7 S. & M. 241.

17. See *Bill of Exchange and Promissory Note*, 108, 109, for the criterion of damages in a suit on a note payable in current bank notes, and the true construction of such contract.

18. See *Bill of Exchange and Promissory Note*, 116, 117; as to how far a bank is liable for not protesting note deposited with it for collection; and whether the bank is liable for the neglect of the notary employed by it.

19. See *Usury*, 9, 14; what effect usury has upon contract made by bank, and for questions connected therewith.

20. A bank has power to secure its loans in any manner not prohibited by its charter or some public statute; it has therefore power to receive cotton as collateral securi-

ty for a loan; and to ship and sell it for account of the debtor; especially where there was a clause in its charter, authorizing it to buy and sell property at pleasure. *Commercial Bank of Manchester v. Nolan*, 7 How. 508.

21. Where a note is sued upon by a bank, which is payable to and discounted by the plaintiff, it is incompetent, for the purpose of diminishing the amount of the recovery; to show that the bills of the bank were at a depreciation when the note matured; the bank is entitled to recover the full amount of the note. *Commercial and Railroad Bank of Vicksburg v. Atherton*, 1 S. & M. 641.

22. It seems that the notes of a bank are a good offset against a note payable to the bank, though the note has been assigned to general assignees of the bank, and suit is brought for the use of the assignees. *Ib.*

23. See *Defeasance*, 1. Where in a separate contract a party agrees to take bank notes in payment of a note, there must be a tender in such notes at the maturity of the note, or the party will recover good money.

24. The notes of a bank are evidence under money counts in a suit against the bank. *Hughes v. The Grand Gulf Bank*, 2 S. & M. 115.

25. The statute providing that the debtors to banks when garnished, may pay the judgment of the court against them, in the notes of the bank as whose debtors they are garnished, extends also to the case of a debtor of a bank, whose indebtedness has been attached and sold by judicial proceedings in another state, and suit been instituted against such debtor by the purchaser at such sale. *Reggs v. Dyche*, 2 S. & M. 606.

26. All legislation impairing the obligation of the contract of a bank charter, is in violation of the constitution of the United States. *Payne v. Baldwin*, 3 S. & M. 661.

27. The right to transfer notes and other choses in action, by indorsement, not being expressly conferred in a bank charter, and that right not being essentially important to enable the bank to carry on its business, nor necessarily implied by its charter, the act of 1840, which prohibits banks in this state from transferring such notes and other choses in action, does not deprive them of any granted franchise, and is not unconstitutional; nor can the assignee of a note assigned in violation of the statute, maintain an action thereon. *Ib.* The plea by which the defence in such case should be set up should be by plea in abatement, as the statute says such suit "shall abate on the plea of the defendant;" where therefore an action was brought in the name of the Planters Bank against certain makers of a note payable to it, and they plead *puis darrein continuance*, that the bank had since the institution of the suit transferred the note, and the court below thereupon entered a judgment final for the defendants; *held*, that it was erroneous; the judgment should have been in *abatement*. *Planters Bank v. Sharp*, 4 S. & M. 17.

17. The defence must be made by plea in abatement; it cannot be done under the general issue. *Hazlip v. Leggett*, 6 S. & M. 326. The only mode of the defendant's availing himself of the defence is by plea in abatement. *Lanier v. Trigg*, 6 S. & M. 641. *Commercial Bank of Columbus v. Thompson*, 7 S. & M. 443.

28. By its charter the Mississip-

pi and Alabama Railroad Company can hold real estate for the purpose of erecting thereon the bank buildings, as well as the railroad. *Cocke v. Lane*, 3 S. & M. 763.

29. After the expiration of the charter of a bank, it ceases to exist for any purpose; and suits then pending in its name against its debtors must abate. *Bank of Mississippi v. Wrenn*, 3 S. & M. 791.

30. Where a note is not discounted by the number of directors required by law, but the bank afterwards sue upon the note, such suit will ratify the discount and make the note binding: as a corporation may confirm the act of its agent. *Planters Bank v. Sharp*, 4 S. & M. 75.

31. See *Executor and Administrator*, 196, 197; whether where insolvent estate is indebted to a bank, the bank can be compelled to take its *pro rata* portion in its own notes, and the mode of reaching it.

32. See *Judgment*, 111. Where a bank has judgment against officers of court and they have judgment for costs against the bank, the one will be set off against the other.

33. An information in the nature of a *quo warranto*, filed by a district attorney of the state in one of the circuit courts thereof, under the provisions of the act of 1843, which makes it the duty of any district attorney, who shall have reason to believe that any bank in this state has been guilty of a violation of its charter, or upon affidavit of one or more credible persons to that effect, forthwith to file such information, is a civil and not a criminal proceeding. *Commercial Bank of Rodney v. The State*, 4 S. & M. 439.

34. The provision in the act prescribing the mode of proceed-

ing against incorporated banks for violations of their charters, which authorizes, upon the filing of an information against any bank, an injunction to issue restraining all persons from the collection of any demands claimed by such bank or its agent or assignees or other persons, does not impair the obligation of any contract between such bank and the state, and is not a violation of the constitution of the United States. *Ib.*

35. The provision in the sixth section of the act of 1843, directing the mode of proceeding against banks for violations of their charters, which makes it the duty of the clerk of the circuit court, upon the filing of any information against a bank, to issue, as a matter of right on the part of the state, an injunction to restrain all persons from the collection of any demands claimed by said bank or its agents or assignees or officers, is not a violation of the constitution of the state, and does not confer judicial power upon the clerks of the circuit courts whose duty it is made to issue the injunction. *Ib.*

36. By the charter of the Mississippi Railroad Company conferring banking privileges on that company it was enacted that the subscribers should pay, at the time of subscription, twenty dollars on each share taken in specie or in the notes of specie-paying banks; the charter was silent as to how or when the residue of the stock should be paid, but conferred all the usual rights, powers and privileges of banking which were exercised by other banks in this state; *held*, that the residue of the capital stock was payable by the stockholders in specie only. *King v. Elliott*, 5 S. & M. 428.

37. The payment of the capital stock in specie is an essential requisite to the existence of a bank. *Ib.*

38. The capital stock of a bank is a trust fund for the payment of the note-holders and creditors of the bank. *Ib.*

39. The acts of the legislature of 1840 and of 1842, which provide for the payment of the debts due to the banks of this state by the debtors, even when garnisheed, in the notes of such banks, do not apply to the indebtedness of delinquent stockholders for stock unpaid in; such indebtedness can only be discharged in specie, whether to the banks or to a garnishee; it may be garnisheed at law by a judgment creditor, and when so garnisheed, the delinquent stockholder must pay in specie. *Ib.*

40. K., being a judgment creditor of a bank in this state, garnisheed E. under the statute of 1827, as a debtor to the bank; E. answered that he owed the bank eleven hundred dollars on his original subscription as a stockholder, and tendered that sum in the notes of the bank in discharge of the garnishment; *held*, not to be a discharge; and it not appearing that the capital stock was not an ample indemnity for all the creditors, nor that E. was a creditor when he was garnisheed, *held*, that K. was entitled to a judgment against E. in the ordinary form for the amount of stock due by him. *Ib.*

41. It seems that where a debtor of a bank is garnisheed at law, he cannot after the garnishment, acquire notes of the bank to make an offset against the garnisheeing creditor; the claim is transferred by the garnishment, and subsequently acquired offsets cannot avail him. *Ib.*

42. Where, by the act of incorporation of a bank, the subscribers to stock were required to pay at the time of subscription, ten per cent. in specie on the amount subscribed for; a mere subscription for stock, without the subscribers paying the ten per cent. in specie, but merely executing his note to the bank for that sum, would not constitute such subscriber a stockholder; such subscription would be void and impose no obligation on the subscriber. *Hayne v. Beauchamp*, 5 S. & M. 515.

43. Where, by the act of incorporation of a bank, it was provided that the subscribers for stock should each pay ten per cent. in specie on the amount subscribed at the time of subscription; and the commissioners who were to receive the subscriptions and the cash payment took, in lieu of the latter, the note of the subscriber for the required percentage, which note was discounted by the bank and the proceeds on the check of the subscriber being drawn and presented to the bank therefor, put to the credit of such subscriber on his stock account; *held*, that the original subscription for stock was void, as being in violation of the charter, but that the note discounted by the bank and the proceeds credited to the subscriber on his check, as so much stock paid, would not be void; the discount of the note and the direction of the proceeds, with the approbation and at the instance of the subscriber, would render him a stockholder at least to the extent of the note, and would constitute a sufficient consideration to render the note binding. *Ib.*

44. Where, in an action by a bank against the parties to a note held by it, it appeared in proof that the cashier of the bank had made an

agreement which, if carried out, would have discharged all the parties to the note but one; and that he had made that agreement after consulting with two or more of the directors, and the court instructed the jury that the cashier of the bank had no authority to bind the bank by any contract that would release parties, but that if he acted on consultation with two or more of the directors, then his acts would be binding on the bank; *held*, that the entire instruction, taken together, and applied to the facts, would not be erroneous in its conclusion. *Payne v. Commercial Bank of Natchez*, 6 S. & M. 24.

45. To an action brought by a bank payable to it by its corporate name, pleas denying the corporate existence of the bank at the time of the execution of the note and setting up violations of its charter and asserting a failure on the part of the bank to comply with certain prerequisites to its corporate existence, however defective they may be in form, cannot be stricken out on motion, they must be reached by demurrer. *Smith v. Commercial Bank of Rodney*, 6 S. & M. 83.

46. It seems that where property of a bank is sold under a judgment against it for more than will pay the judgment, the sheriff can exact gold and silver from the purchaser for the surplus, and the notes of the bank for such surplus will not be such a payment as will entitle the purchaser to a deed. *Davis v. Pryor*, 6 S. & M. 114.

47. In an action of assumpsit by a bank upon a promissory note payable to itself, it is not competent for the court, at the instance of the defendant, to inquire into the organization of the bank or as to

fraud in the taking of its stock. *Smith v. Mississippi and Alabama Railroad Company*, 6 S. & M. 179.

84. Where in a proceeding by information, in the nature of a *quo warranto*, against a bank, the court was asked to charge the jury, that if they believed from the evidence that the cashier or teller or clerk of the bank, as officers and agents of the bank, received either directly or indirectly from any one the notes of non specie-paying banks, in payment for any part of the capital stock of the bank, they must find for the plaintiff; it was *held*, that the charge was too broad; to make a payment binding on the corporation, it should be made to some agent authorized to receive it; the acts of a cashier of a bank, are only binding upon the bank, when he acts within the sphere of the agency prescribed to him; if there be no express regulation or restriction, all acts which appertain to his office will bind the bank; if he be restricted in the scope of his agency by the bank, his act in violation of the restriction or beyond its limit, will not be the act of the bank; his acts, however, will be *prima facie* binding on the bank, when performed in the discharge of the ordinary duties which belong to that officer; and in order to avoid such acts, it devolves upon the corporation to show a special restriction imposed upon the cashier by the directors. *The State v. Commercial Bank of Manchester*, 6 S. & M. 218.

49. A directory of a bank may, through its cashier, violate the charter of the bank; if however they can show, that in the particular act of the cashier, alleged to be a violation of the charter, he departed from his duties as prescribed by

them, such act will not cause a forfeiture of the charter. *Ib.*

50. Where in an information, in the nature of a *quo warranto*, against a bank; the court was asked to charge the jury, that "if they believed that it was agreed between the cashier of the bank, and M., a holder of part of the capital stock of the bank, that M. should, in order to make payment for his stock and evade the charter of the bank, procure the notes of the bank, then not paying specie, and that the cashier should receive them and count out their amount in specie, and immediately take or receive back the specie, without M.'s being at liberty to take it from the bank, and that M. should thereupon receive a certificate of stock, and that this was done, they must find for the plaintiff;" it was *held*, there being proof that the directory had given positive instructions that nothing but gold or silver, or the notes of specie-paying banks should be received in payment of stock, that the charge, as asked, was properly refused. *Ib.*

51. If a plea of *nul tiel corporation* under oath, be filed to a declaration by a bank, on a note, and issue be joined thereon, and the bank introduce in evidence a copy of the act, of its incorporation, with proof of user under the charter, it is sufficient to entitle it to recover. *Henderson v. Mississippi Union Bank*, 6 S. & M. 314.

52. See *Contract*, 59; when defendant sued on a contract, with a bank, may show the depreciation of the notes of the bank, at the time, by way of offset.

53. The provisions of the act of the legislature of 1843, (*Acts*, p. 53,) entitled an act, "prescribing the mode of proceeding against in-

corporated banks, for a violation of their franchises;" which provide that when a judgment of forfeiture is entered against a bank in proceedings under that act, its debtors shall not thereby be released from their debts and liabilities; but that the court rendering such judgments shall appoint one or more trustees "to take charge of the books and assets of the bank, to sue for and collect all debts due to it, to sell all its property and apply the same, as might be thereafter directed by law, to the payment of its debts," do not impair the obligation of the contracts of the debtors of the bank, and are in all respects constitutional. *Nevitt v. Bank of Port Gibson*, 6 S. & M. 513.

54. All legislation, which materially affects the laws for the enforcement of a contract, which exist at the time it is made, impairs the obligation of the contract; yet the right of the legislature to remit a penalty or forfeiture, imposed by law, exists, and may be enforced without impairing the obligation of any contract to which the penalty or forfeiture may be attached; where, therefore, a bank has forfeited its charter, it is a legitimate and proper exercise of legislative power to provide by law for the preservation of the property of the bank for the benefit of its creditors, by remitting the penalties which attach to a judicial judgment of forfeiture of charter. *Ib.*

55. The sixth section of the act of 1843, prescribing the mode of procedure against banks which have forfeited their charters, which authorizes the issuance of an injunction against the bank to restrain it from the collection of its debts, is constitutional only when taken in connection, and regarded as part of

the same law, with the ninth, tenth, and eleventh sections of the act, and which provide for the collection and preservation of the debts and assets of the bank for the benefit of creditors. *Ib.*

56. Where a judgment of forfeiture has been rendered under the act of 1843, and trustees have been appointed by the court rendering the judgment, all suits pending in the name of the bank, whether at law or in equity, may be revived at the instance and in the name of the trustees; and the action will progress in the name of such trustees in the same manner and to the same effect that a suit is revived in the name of an executor or administrator, which was pending in the life-time of the testator or intestate. *Ib.*

57. The act of 1843, in its ninth, tenth, and eleventh sections, directing the trustees to proceed to collect the debts and property of the bank for the benefit of creditors to be applied as thereafter directed by law, constitutes the property of the bank a trust-fund for the benefit of creditors, which no subsequent legislation can appropriate otherwise; and if the legislature fail to direct the mode of distribution among the creditors, a court of chancery will execute the trust; such judgment of forfeiture and appointment of trustees, is an assignment by operation of law of all the property of the bank to the trustees for the benefit of creditors; which relates back to the period of the issuance of the injunction against the bank under the act, and preserves the assets and property of the bank from that time, for the benefit of creditors; such judgment has none of the common law consequences of a forfeiture; the legislature has

waived its right to those penalties by providing that concurrently with the judgment of forfeiture, the assets and property of the bank shall vest in trustees for the benefit of creditors of the bank. *Ib.*

58. The mere judgment of forfeiture does not, *ipso facto*, work a dissolution of the corporation; there must be first execution and the seizure of the franchises before the penalties of forfeiture take place. *Ib.*

59. In a proceeding against a corporation as such for forfeiture of charter, the performance of conditions precedent to the existence of the corporation cannot be inquired into; its existence as a corporation is admitted by the proceeding against it. *Commercial Bank of Natchez v. The State*, 6 S. & M. 599.*

60. The charter of the Commercial Bank of Natchez provided, that no person, firm, or corporation should, in the original subscriptions for stock, on any one day subscribe, directly or indirectly, or procure any other person to subscribe, with the understanding that it should be transferred after the books were closed, for more than fifty shares of stock; in a proceeding by *quo warranto* against the bank, it was alleged as a ground of forfeiture, that more than fifty shares had been subscribed for, in violation of that section of the charter, and that the stock had been afterwards transferred; *held*, that these subscriptions for stock being under the superintendence of eight commissioners named in the charter, and under their supervision, and before the bank had a corporate existence, the bank as such,

could not be held responsible for the violations of law of those commissioners who were the agents of the state; *bona fide* subscribers to stock in a bank cannot be affected by irregularities which occur in the subscriptions for stock preliminary to the organization of the bank, made under the supervision of agents of the state appointed for the purpose of organizing the bank. *Ib.**

61. It was provided in the charter of the Commercial Bank of Natchez, that "should any stockholder refuse or fail to pay any instalment on his stock when called for, the company shall sell said stock, on giving thirty days' notice in some gazette on account of and at the risk of the stockholder;" *held*, that a failure on the part of the bank to comply with this provision was not a cause of forfeiture of the charter of the bank; the authority to sell the stock was a mere cumulative remedy given to the corporation to enable it to coerce the payment of stock in a more speedy manner than by action at law. *Ib.**

62. A refusal by a bank, on proper application, to pay its notes, bills, bonds, and other liabilities issued by the bank, in specie, is a cause of forfeiture of the charter of the bank. *Ib.*

63. The charter of the Commercial Bank of Natchez contained no provision which in so many words required the bank at all times to pay specie; the capital stock was to be paid in gold or silver, or the notes of specie-paying banks, and the bank was prohibited from issuing notes to a greater amount than three times that of the capital stock

* By Mr. Chief Justice SHARKEY; the other judges giving no opinion on these points.

paid in; by another section of the charter it was provided, that if the bank refused to pay its notes on demand, the holder might demand an interest of twelve and a half per cent. per annum on such notes, the payment of which had been refused. In a proceeding by *quo warranto* against the bank, it was alleged, as a cause of forfeiture, that the bank, on the first day of November, 1841, and on divers other days before and since, did refuse, on demand being made at its counter in its banking-house, during the regular hours for doing business, to redeem in specie or other lawful money of the United States, the notes, bills, bonds, and other liabilities issued by said bank and then due; *held*, on demurrer by the bank, that the cause of forfeiture was sufficiently pleaded, and the demurrer must be overruled; nor will the answer of the bank, that it paid all its notes and liabilities except certain checks which it had drawn on another bank, for payment of which provision had been made with that bank, but it failed to pay them and they were returned, at which time the bank was not able to redeem them, but in two years afterward and before the commencement of any proceedings against it, it resumed specie payments on these checks and all other liabilities, whenever payment was demanded at its counter, and was then paying specie, be a sufficient answer to the charge of forfeiture or any excuse for the suspension. How far a mere temporary suspension of specie payments by a bank will work a cause of forfeiture, and what is a temporary suspension; *quare?* *Ib.*

64. In the year 1840 the Commercial Bank of Natchez, charter-

ed previously, being in a state of suspension of specie payments, the legislature passed a law that all the banks in the state, by the first of April thereafter, should pay specie on their notes of five dollars; by the first of July, on their notes of ten dollars; by the first of October, on their notes of twenty dollars, and by the first of January, 1841, on all their notes, bills, and other liabilities; *held*, that this act was constitutional and valid; and a failure on the part of the bank to comply with the provisions of the law would work a forfeiture of its charter. *Ib.*

65. A bank charter is a contract within the meaning of the constitution of the United States, and any legislative act which impairs it by enlarging the power of the state over the body corporate, or by abridging its franchises, or which alters it in any material point, is void. *Ib.*

66. In 1843, the legislature passed a general law prescribing the mode of proceeding against banks that had violated their charters; and in the same year proceedings were commenced under it against the Planters Bank. In 1844, the legislature passed an act specially in relation to that and another bank, authorizing them upon certain conditions to surrender their charters; and upon their refusal to do so, making it the duty of the attorney-general, and requiring him to proceed by bill in the superior court of chancery against them, have a receiver appointed to take charge of their property, and proceed to have them wound up; and providing that if either of the corporations should accept and comply with the conditions of the act by a voluntary surrender of its charter, then such

bank should be released from the operation of the law of 1843; the Planters Bank did not accept the conditions of the law of 1824; and the proceedings under the law of 1843 progressed to judgment against it, when the bank appealed to the high court, and contended that the circuit court had no jurisdiction by reason of the act of 1844, over the bank; *held*, that there was no necessary repugnancy between the two acts, and therefore the latter was not by implication a repeal of the former; that no proceedings being instituted in the chancery court under the latter act, the circuit court did right to proceed to judgment under the law of 1843. *Planters Bank v. The State*, 6 S. & M. 628.

67. Where a suit is brought by A. and B., assignees of C., who is payee of a note, and the defendant does not deny that they are such assignees, under oath, he cannot show that the note is in reality the property of a bank, and thus insist upon his right to pay it in the notes of the bank after judgment. *Lanier v. Trigg*, 6 S. & M. 641.

68. Corporations may contract under their corporate seal, by a vote of the directory, entered on the books of the corporation, or by their agents acting within the scope of their authority; and binding contracts may be implied from their corporate acts, without either a vote, deed, or writing. *Petrie v. Wright*, 6 S. & M. 647.

69. The failure by a bank to redeem in specie the notes which it has put into circulation, is a cause of forfeiture of its charter; when it suspends specie payments, it ceases to discharge the obligation imposed upon it by its creation, and to answer the ends for which it was

instituted, and unless there be some express exemption extended to it for such failure, the state may resume its grant. *The Planters Bank v. The State*, 7 S. & M. 163.

70. It seems that banks are not exempt from the rules of the common law in regard to corporations, and the application of the law of *quo warranto* to them for forfeiture of charter; but are subject to them at least so far as to have a judgment of forfeiture entered against them for a failure to pay their notes in specie. *Ib.*

71. Where a person, on being authorized so to do, collected the debt of another in notes of a bank then current at par, with instructions to pay the proceeds after satisfying a debt due to himself, over to a third person, and that third person directed a special appropriation of the money to another party, who was willing to take it at par, which appropriation the holder of the notes refused to make; *held*, that this refusal made the subsequent holding of the notes at his own risk, and that he would be liable to the person entitled to the money for the full amount thereof in specie, notwithstanding the depreciation of the notes. *Knight v. Yarborough*, 7 S. & M. 179.

72. A court of equity has no jurisdiction of a bill at the suit of a portion of the stockholders of a bank against the president and cashier to restrain them from the exercise of their functions as such, for alleged malfeasance in office; the directory of a bank have, even though it be not expressly conferred, full power of removal of such officer from office; and court of chancery has no control over the subject of amotion from office. If, however, the stockholders alleged

in their bill that the directory connived at the mismanagement of the officers, it seems a court of equity would interfere and restrain their mal-conduct. *Bayless v. Orne*, Freem. Ch. 161.

73. Chartered privileges cannot be taken away by any collateral proceeding; nor in any other mode except the usual forms by *scire facias* or *quo warranto*; a court of chancery has no jurisdiction or power over corporate bodies for the purpose of restraining their operations, or winding up their concerns; unless it be conferred by statute. *Ib.*

74. The stockholders of a bank may remove its directory *for cause*, even though they may hold office for a fixed time, and no power be expressly given to remove; but a mere ministerial officer, such as cashier, &c., may be removed at pleasure, whether there be cause or not. *Ib.*

75. All suits brought for the purpose of compelling ministerial officers of a private corporation to account for breach of duty, should be brought in the name of the corporation; unless it be alleged that the directory connived at the delinquency. *Ib.*

76. S. contracted with P. and others to do a piece of work for a certain agreed price, and receive his pay in the notes of a particular bank or their equivalent, the price agreed to be paid being but a fair compensation for the labor to be done; before the work was completed the notes of the bank agreed upon depreciated, to be worth but one tenth of their value at the time of the contract; S. filed his bill to enforce the payment, in good money, of the debt due him, which P. and others re-

sisted, and claimed the right to pay in the notes agreed on; *held*, that the great depreciation of the notes was a circumstance not looked or provided for by either party; that it would be inequitable to force S. to receive them, and that he was entitled to recover a fair price for the work done in current money. *Sample v. Pickens*, 1 S. & M. Ch. 501.

77. L. M. & Co., being the holders of a note secured by mortgage of W. H., received from a transferred claim belonging to W. H. the sum of \$1100 in depreciated paper, but refused to deliver it to H. when called for; L. M. & Co. afterward transferred the note of H. to D., who filed a bill to foreclose the mortgage; *held*, that H. was entitled to a credit of the \$1100 in specie. *Dick v. Truly*, 1 S. & M. Ch. 557.

78. A banking corporation has power to make an assignment of its effects for the benefit of its creditors, to trustees, and such an assignment will be upheld in equity. *Montgomery v. Commercial Bank of Rodney*, 1 S. & M. Ch. 632.

79. The legislature of Mississippi, in the year 1840, passed an act, declaring that "no bank in this state shall transfer by indorsement or otherwise, any note, bill receivable, or other evidence of debt;" *held*, that this act did not take away from a bank in failing circumstances the right to make a general assignment of its effects for the benefit of its creditors. *Ib.*

80. Is not a law, prohibiting corporations from the performance of acts not prohibited by their charter, and not extending the prohibition to individuals, in conflict with that clause of the constitution declaring "all freemen, when they

form a social compact, equal in rights," *Quære? Ib.*

81. A corporation is trustee for the creditors; and where a transfer of its property is made without valid consideration, they may pursue the property and force the assignee thereof to account for it. *Wright v. Petrie*, 1 S. & M. Ch. 282. *Robins v. Embry*, 1 S. & M. Ch. 207.

82. See *Assignment for the benefit of Creditors*, 1-19; for the power of a bank to make such assignment, and for its nature and requisites, and what will vitiate it.

83. A cashier is not necessarily one of the incorporators, and is not therefore a defendant to a bill, unless specially made so, and his answer denying the equity of the bill, "on information and belief," without stating what information he has, will not be evidence against the positive allegations of the bill. *McGuffie v. Planters Bank*, Freem. Ch. 383.

84. A payment of an execution in bank notes current in the country, and at par, it seems would be a satisfaction of the execution if not objected to at the time by the plaintiff therein; but where the defendant, before the court adjourned at which the judgment against him was rendered, ordered out the execution, and paid it immediately to the sheriff in depreciated and depreciating bank notes; *held*, that the payment was no satisfaction of the execution, and the entry of satisfaction thereon would be set aside as fraudulent and void. *Osgood v. Brown*, Freem. Ch. 392.

85. The act which prohibits the banks of this state from assigning their negotiable securities, and requires them to receive their own notes in payment of all debts due

them, was intended for the benefit of the debtors of the banks, and they may waive their rights under the act, if they choose to do so; where, therefore, a bank assigned a note, and the assignee instituted suit and recovered judgment thereon without the defendant's pleading the assignment in abatement, they were held to have waived their right to pay in the notes of the bank; it is a right which they can only assert when sued by such assignee, by plea in abatement, and if they omit that, their right is gone, and a tender of the notes of the bank to the sheriff will not be good, and if they are received and the execution entered satisfied, the entry of satisfaction will be erroneous, and be set aside at the instance of the assignee. *Com. Bank of Columbus v. Thompson*, 7 S. & M. 443.

BANKRUPT AND BANKRUPT LAW.

1. See *Assignor and Assignee*, 5; in whose name suit should be prosecuted on a judgment in favor of a bankrupt, which has been sold.

2. See *New Trial*, 58; a plea of bankruptcy not a plea to the merits.

3. A plea of bankruptcy which sets forth that after the making of the promise sued on, the defendant became a bankrupt, within the meaning of the statute of bankruptcy, but which sets out no *discharge* under the law, is bad. *Atkinson v. Fortinberry*, 7 S. & M. 302.

4. A purchaser at a sale made by an assignee in bankruptcy of the bankrupt's effects, acquires only such title as the bankrupt had at the time of his discharge; where, therefore, a bankrupt, before he

filed his petition in bankruptcy assigned a claim due to him, which was then in the hands of his attorney for collection, and the debtor was duly notified of the transfer; and the claim was, notwithstanding the transfer, included in the schedule of the bankrupt's effects, and sold by his assignee in bankruptcy, and afterwards paid by the debtor to the purchaser at the assignee's sale; *held*, that payment to the latter was improper, and no discharge of the debt. *Anderson v. Miller*, 7 S. & M. 586

BARGAIN AND SALE.

See *Vendor and Vendee*, 3.

BASTARDS.

Bastards are not included in our statutes of descents; if their parents afterwards intermarry, our statute makes them legitimate. *Porter v. Porter*, 7 How. 106.

BILL OF CREDIT.

1. The words "bill of credit," as used in the constitution of the United States, mean "a paper medium intended to circulate between individuals, and between government and individuals as money, for the ordinary purposes of society." *Pagaud v. The State*, 5 S. & M. 491.

2. Auditor's warrants issued under the law of this state, making it the duty "of the auditor of public accounts to examine, settle and audit all accounts, claims or demands whatsoever against the state arising under any act or resolution of the legislature, and to grant to every claimant authorized to receive the same, a warrant on the

state treasury," are not bills of credit, within the prohibited sense of the term; even though such warrants may have been sometimes used by individual holders as a circulating medium, and a substitute for paper money. *Ib.*

3. In determining whether a certain instrument be a bill of credit, the intention of the legislature, by whose authority it is issued, is an important inquiry; but that intention can only be deduced from the legislative acts; testimony *aliunde*, to explain the motives or point out the objects of the law-makers, is wholly inadmissible. *Ib.*

4. On a trial of a prisoner for alleged forgery of an auditor's warrant, proof that when the warrant was issued there was no money in the treasury to take it up, that warrants were not then redeemed, were under par, and circulated from hand to hand as money, with the view of shewing that they were bills of credit; *held* inadmissible. *Ib.*

BILL OF DISCOVERY.

1. See *Evidence*, 183; may be abandoned, when not answered, and evidence offered to prove what it calls for a discovery of.

2. Where the answer is used it is evidence for or against the party using it, but the bill of discovery may be dismissed and other evidence resorted to; if the party who prays for a discovery does not use the answer it is not his evidence and he cannot be concluded by it; and he may use other evidence to establish a fact in reference to which a discovery was sought. *Carson v. Flowers*, 7 S. & M. 99.

3. See *Chancery*, tit. *Bill of Discovery*.

BILL OF EXCEPTIONS.

1. Exceptions not taken by bill of exceptions, duly signed and sealed, cannot be taken notice of, by the supreme court. *Woodsides v. State*, 2 How. 655; *Tyson v. Hamer*, 2 How. 669; *Hackler v. Cabell*, Walk. 91; *Byrd v. State*, 1 How. 163.

2. A judge, during the progress of the trial below, may change his opinion though embodied in a bill of exceptions, signed and sealed. *Winn v. Cole*, Walk. 119.

3. Errors not excepted to, will not be noticed. *Carraway v. McNeice*, Walk. 538.

4. Exceptions, unless the bill of exceptions shows that they were taken at the time made, and where there is a jury, before its retirement, will not be regarded. *Wilson v. Owens*, 1 How. 126; *Irwin v. Jones*, 1 How. 497; *Patterson v. Phillips*, 1 How. 572; where however the exception is to the overruling or grant of a new trial, the party may embody the evidence in a bill of exceptions, though not excepted to at the trial, and the court of appeals will consider of the case, as the circuit court would do. In such case, all the evidence must be embodied; that the court above may consider of the whole case. *Phillips v. Lane*, 4 How. 122; *DeLoach v. Walker*, 7 How. 164; *Carpew v. Canavan*, 4 How. 370; *Robins v. Pinckard*, 5 S. & M. 51; If it do not set out the substance of the whole evidence, it will be defective. *Terry v. Robins*, 5 S. & M. 291; *Wright v. Bank of Alabama*, 6 S. & M. 251; the language of the bill will prevail over that of the record, as to the time of taking. *Carpew v. Canavan*, 4 How. 370; *Helm v. Smith*, 2 S. & M. 403.

5. Where the action of the court below, is predicated on evidence, it will be presumed to be correct, unless the evidence be embodied in a bill of exceptions, from which its error is apparent. *Byrd v. State*, 1 How. 163.

6. Evidence on the trial below, and papers in the record not legitimately parts of it, will not be regarded, unless embodied in bills of exception, or so referred to therein by apt description, as to leave no possibility of doubt, as to their identity. *Goode v. Linecum*, 1 How. 281; *Berry v. Hale*, 1 How. 315; *Maulding v. Rigby*, 1 How. 579; 4 How. 222; *Oliver v. The State*, 5 How. 14; *Briggs v. Clark*, 7 How. 457; *Bone v. McGinley*, 7 How. 671; *Barfield v. Impson*, 1 S. & M. 326; *Abbott v. Hackman*, 2 S. & M. 510; *Wright v. Bank of Alabama*, 6 S. & M. 251; *Wadlington v. Gary*, 7 S. & M. 522; *Williams v. Guignard*, 2 How. 722; *Rogers v. McDaniel*, 3 How. 172; *Carmichael v. Browder*, 4 How. 431.

7. The words in a bill of exception, "here insert it," when spoken of a judgment alleged in the bill of exceptions, to have been read to the jury, will not be sufficiently descriptive of the judgment to permit the court to take notice of a judgment spread out in the record but not embodied in the bill of exceptions. *Ib.* So of any other evidence. *Rankin v. Holloway*, 3 S. & M. 614.

8. An execution, and a forthcoming bond, not embodied in a bill of exceptions, is not a part of the record and will not be noticed. *Ross v. Garey*, 7 How. 47; *Sprawles v. Barnes*, 1 S. & M. 629; *Davis v. Baldwin*, 1 How. 550; *Grigsbey v. Francis*, 2 How. 845.

9. A bill of exceptions to the refusal to grant a new trial, which does not embody the evidence, cannot be aided by another bill of exceptions, not properly taken to the ruling out of testimony. *Patterson v. Phillips*, 1 How. 572.

10. A plat contained in a bill of exceptions will be presumed to be the one to which the objection was made, although words of identification are wanting. *Carmichael v. Trustees of School Lands*, 3 How. 84.

11. Where the attorney for the defendant offered to withdraw his plea, but the court refused to permit him to do it, to which he took no exception at the time, but afterwards embodied the statement in an affidavit on a motion for a new trial, and had the affidavit made part of a bill of exceptions to the refusal to grant a new trial; *held*, that the refusal of the court to allow the withdrawal of the plea, did not appear of record, so as to be the subject of objection; it ought to have been made so by bill of exceptions taken at the time. *Green v. Robinson*, 3 How. 105.

12. Where exceptions are taken and noted at the time, and by the consent of the court and counsel of the other party, drawn up after the jury retire, *nunc pro tunc*, it will be sufficient. *Wilcox v. Mitchell*, 4 How. 272.

13. Whatever is set out in one bill of exceptions, may be referred to in another bill, in the same suit, and will be considered as part of the record. *Stark v. Gildart*, 5 How. 606.

14. Unless rejected evidence is embodied in a bill of exceptions, exceptions taken to its rejection will not be regarded. *Harris v. Newman*, 5 How. 654; *Bone v.*

McGinley, 7 How. 671; the bill of exceptions must show the precise ground of exceptions. *Friar v. State*, 3 How. 422.

15. Affidavits for new trials are not parts of the record, unless made so by bills of exception. *Ross v. Garey*, 7 How. 47.

16. A bill of exceptions to the refusal to grant a new trial signed in vacation, is invalid; unless the record shows that the motion for a new trial was taken under advisement. *Tucker v. Gordon*, 7 How. 306.

17. The recital of the clerk, in the record, that exceptions were taken at the proper time, will not aid a bill of exceptions in which that fact does not appear. *Harris v. Planters Bank*, 7 How. 346; so also the recital of the clerk, that certain papers in the record were those referred to in the bill of exceptions, will not be evidence of that fact. *Maulding v. Rigby*, 4 How. 222.

18. A bill of exceptions is the only medium of communication between the high court of errors and the circuit court, and the only evidence of what takes place on the trial. *Barfield v. Impson*, 1 S. & M. 326; *Vaughan v. The State*, 3 S. & M. 553.

19. Where all the evidence in the case is not included in the record, in the absence of which the high court cannot otherwise determine upon the propriety of the judgment, it will consider a particular point excepted to as to the improper admission of testimony, and judge accordingly. *Scott v. Watkins*, 2 S. & M. 233; *Worten v. Howard*, 2 S. & M. 527; *Tinnin v. Garrett*, 4 S. & M. 207; and where the court below refuses to hear any testimony to prove the issue or a material fact, it is not

necessary to set out the evidence refused to be heard, but it will be sufficient if the record show that the court rejected all testimony on the subject; it is otherwise, however, where the question is, whether the evidence is material to prove the issue, there the rejected evidence must be set out in full. *Neal v. Saunderson*, 2 S. & M. 572; *Torrey v. Cook*, 3 S. & M. 60.

20. Where a bill of exceptions, at a subsequent term of the court, states that a motion was made for a new trial at a former term and certain affidavits read setting out the motion and affidavits, even though the records of that term contain no evidence of it, yet the high court will regard the statements in the bill of exceptions as part of the record and consider them conclusive. *Kane v. Burrus*, 2 S. & M. 313.

21. See *Set-off*, 17; the bill of items to plea of payment is not a part of the record, unless made so by bill of exceptions.

22. Bill of exceptions, certified by the clerk below, as appertaining to the case and in the record, need not be entitled of any court or case. *Gordon v. Parker*, 2 S. & M. 485.

23. Where a motion for a new trial was made and continued, and at the next term of the court the motion was overruled, and a bill of exceptions taken thereto, signed by a different judge from the one who presided at the trial, the court will regard it as fully a part of the record as though it had been signed by the presiding judge. *Robinson v. Parker*, 3 S. & M. 114.

24. An imperfect bill of exceptions will not preclude the examination of the rest of the record to ascertain if there be error irrespective of such imperfection. *Rankin v. Holloway*, 3 S. & M. 614.

25. Where a bill of exceptions refers to certain papers as being marked with certain letters of the alphabet, but the writings themselves are not incorporated in the bill of exceptions, the court will not notice them, even though similar instruments are inserted in the record. *Pickett v. Planters Bank*, 5 S. & M. 470.

26. A bill of exceptions, unless signed by the judge, will not be noticed, though it is spread out in the record. *Graves v. Monet*, 7 S. & M. 45.

27. The recital in the bill of exceptions taken to an order of the probate court, setting aside the report of referees of a claim against an insolvent estate, that the party excepting relied on a decree of the probate court allowing his claim as evidence before the referees, is not evidence, before the high court of errors and appeals, of such decree, where none such is embraced in the record. *Green v. Creighton*, 7 S. & M. 197.

BILLS OF EXCHANGE AND PROMISSORY NOTES.

1. Bills of exchange and promissory notes import considerations, and none need be stated in pleadings on them; but in an action on a contract to deliver a certain quantity of cotton, on demand, the consideration must be averred. *Minor v. Michie*, Walk. 24.

2. See *Assignor and Assignee*, 2, as to their negotiability under our statute. *Defrance v. Davis*, Walk. 69.

3. Notice of protest, may be proved without producing the written notice. *Offitt v. Vick*, Walk. 99.

4. An acknowledgment by an indorser of a bill of exchange, that he had received notice of the protest, and supposed he should have to provide for the payment of the bill, is equivalent to legal notice and to a promise to pay; but if the drawer or indorser of a dishonored bill of exchange pay the amount to the holders, without having received notice, and without knowledge of that fact, he may recover the money back; and a promise to pay under ignorance of the facts, is not binding. *Ib.* When it appears affirmatively that the holder of an indorsed note has been guilty of neglect, and omitted to give the proper notice, a subsequent promise of the indorser having knowledge of the laches, to pay the note, operates as a waiver of regular notice; whether the proof of the irregularity, and that the indorser's promise was made with a knowledge of it, is to come from the plaintiff, before he can make such promise operate as a *wai-ver*. *Quære?* But where there is *no proof* of demand or notice, a promise by the indorser to pay the note, made after its protest, is *presumptive evidence* that due demand was made and due notice given to such promising indorser; it is however but *presumptive* evidence, and may be rebutted by proof showing that no demand was made or notice given; therefore where H., being indorser of a note for P., agreed, after maturity and protest, that the holder might grant P. a year's indulgence on it; and at the expiration of the year H. agreed if the holder would sue P. and himself jointly, in the state court, instead of H. alone in the United States court, he and P. would let judgment go by default in the state

court, to which P. assented; and the suit was accordingly brought in the state court; P. refused to let judgment go by default, whereupon H. also refused, and plead to the action, *held*, that H.'s conduct and agreement to let judgment go by default, were equivalent to the most unqualified promise of payment, and were a full admission that he had no defence whatever to make to the action. *Robbins v. Pinckard*, 5 S. & M. 51.

5. It is immaterial from whom the notice of protest is received; the holder of the bill, at maturity, should demand payment, and if that is not made by drawee, should protest the bill and send notice on the same day through the post-office, if the mail has not left. *Ib.*

6. Is a bill of exchange, drawn in our state, by one of its citizens, upon a citizen of another state and there payable, a foreign or inland bill of exchange? *Ib.*

7. In an action of assumpsit on a joint and several promissory note, one of the obligors cannot discharge himself at law, by evidence that he was a security only, and had been injured by the failure or neglect of the plaintiff to prosecute his demand against the principal debtor, after being requested so to do by the surety; such a defence, if available anywhere, must be made in a court of equity. *Kerr v. Baker*, Walk. 140. It seems it is not available anywhere. *Bullit v. Thatcher*, 5 How. 689.

8. A promissory note, indorsed specially, cannot be given in evidence, to support an action in the name of original payee; possession of a note payable to bearer, or one payable to order and indorsed in blank, is *prima facie* evidence of ownership; but if the indorsement

be special, the suit must be in the name of the special indorsee, and if the note return to the ownership of the payee, he must, in an action, show a transfer to him from the special indorsee, or the jury will be instructed as in case of *non-suit*. *Smith v. Runnells*, Walk. 144. *Sed aliter*, the special indorsement may be stricken out at the trial. *Planters Bank v. Chewning*, 5 How. 413.

9. The rules which prevail relative to negotiable paper, must be enforced, as well against illiterate as informed persons, whatever may be the hardships or injustice of their application. *Chanee v. Right*, Walk. 156.

10. Notice of protest, given on the day that a note falls due, is sufficient. *Hargreaves v. Bixler*, Walk. 176.

11. A promissory note is *prima facie* proof of a valuable consideration in the hands of the holder and if in pleading on one a consideration be averred, it need not be proved. *Moore v. Mickell*, Walk. 231.

12. A judgment on a note, in a suit between the indorsee and maker is not conclusive in an action on the same note between the payee and maker. *Wright v. Bixler*, Walk. 256.

13. Judgment by default against indorser of a note, is final. *Owen v. Little*, Walk. 328.

14. The rights of the assignee of a promissory note, will not be affected by the service of a garnishment upon the payee of the note, after assignment; being a chose in action, it is not affected by lien of a judgment. *Black v. McMurtry*, Walk. 389.

15. Notice of protest left at the nearest post-office to the residence

of the indorser, where he does not live in the town, is sufficient. *Stamps v. Brown*, Walk. 526; *Sed aliter Wilcox v. McNutt*, 2 How. 776; *Patrick v. Beazley*, 6 How. 609. The post-office can be used only as a medium of *transmission*, and not of deposit merely; where, therefore, an indorser lives out of the corporate limits, but nearer to the post-office of the town where the note is protested than to any other post-office, he is entitled to personal notice; and notice deposited for him in the post-office will not bind him. *Ib.* To the same effect is *Hoggatt v. Bingaman*, 7 How. 565; where all the cases are reviewed, and the decision in *Patrick v. Beazley* confirmed.

16. Where A. executed two notes to B., which B. indorsed to C., and A. die insolvent, and his estate paid seventy-two cents in the dollar, and B. is sued as indorser on both notes and nonsuits C. on the first, the credit of seventy-two cents must be distributed *pro rata* on both notes, and not allowed altogether on the one whereon B. was made liable. *Ib.*

17. The doctrine that a party to negotiable paper is not a competent witness to affect it, does not apply where the indorser is offered to prove some fact transpiring after he had parted with the paper. *Drake v. Henly*, Walk. 541.

18. See *Garnishment*, 2, 3 and 4, as to conflicting rights of assignee of note, and garnisheeing creditor of payee.

19. Where an account is closed by note, suit must be brought on the note, and cannot be maintained on the account. *Slocumb v. Holmes*, 1 How. 139.

20. A note given for an improvement upon vacant govern-

ment land, where there was no right of preëmption, is for an illegal consideration and void; both parties being mere trespassers; a consideration to uphold a note must not be merely beneficial or prejudicial to the one party or the other, but the benefit must arise from a legal act. *Merrel v. Le-grand*, 1 How. 150.

21. See *Evidence*, 52-54, as to when, in an action on a note made by A. B. & Co., the company, in order to deny the execution of the note, must plead under oath; and also how far note with condition is a positive promise to pay.

22. In an action against the maker of a note payable at a particular place, no demand at that place need be averred or proved. *Washington v. Planters Bank*, 1 How. 230.

23. Interest on a debt is an incident to it, and need not be declared for in the declaration; and where a judgment by default is taken on a note, the clerk will calculate interest on it. *Ib.*

24. Where one of the joint makers of a note becomes afterwards, in conjunction with another person, the assignee of the note, such assignees cannot sue the other makers on the note; the note was discharged on being assigned to one of its makers; nor in such case will it make any difference if the maker, who thus becomes one of the joint assignees, was but a surety of his co-makers; he can sue them for contribution, but not on the note; that is paid. *Stevens v. West*, 1 How. 308.

25. The possession of a promissory note by A. payable to B., and not indorsed, is evidence of A.'s ownership of the note, and in an action against A. by the

maker of the note, he may plead such note as a set-off. *Glass v. Moss*, 1 How. 519.

26. The words *without plea* or *offset*, in a promissory note, are not an essential part of the contract, and will not preclude a defence to the note. *Williams v. Harris*, 2 How. 627.

27. In an action on a note it is competent for the defendant to show under the general issue, that the plaintiff has no interest in it, and thus defeat the action; and although possession of a note is *prima facie* evidence of ownership, it may be rebutted by other proof; and it seems if the note be payable to bearer, under suspicious circumstances, the bearer might be compelled to show how he acquired it; and if the maker pay, a holder who he knows has no right to recover, it will not be an extinguishment of the debt. *Netterville v. Stevens*, 2 How. 642. A plea, therefore, that the plaintiff had no interest in the note sued on, would be bad as amounting to the general issue. *Ib.*; yet to such a plea the replication that he had an interest in the note, would be a good traverse. *Anderson v. Patrick*, 7 How. 347. And it seems that on the trial the plaintiff must show an interest; and proof is admissible to disprove it. *Ib.*

28. An inland bill of exchange, drawn before the act of 1836, taking off damages, but protested for non-payment after the act, is not entitled to damages. *Puckett v. Redman*, 2 How. 688.

29. Where a negotiable note, after having been indorsed by the payee, returns to the hands of the maker, he cannot reissue it so as to bind the indorsers; but if an action on such a note thus reissued be

brought against the indorser and he permit judgment to go by default, it will be the admission of a cause of action, and the judgment will not be disturbed. *Claiborne v. Planters Bank*, 2 How. 727.

30. If the declaration on a bill of exchange do not show that it was a foreign bill, it will be regarded as a domestic one, and subject to damages as such; nor will the court judicially know that a bill addressed to persons in New Orleans, is addressed to persons out of the state. *Rowland v. Hoover*, 2 How. 769.

31. Where a bill is subject to damages on protest, it is error to calculate interest on the damages; it can only be allowed on the amount of the bill. *Ib.*

32. Where parties reside in the same city or place, notice of protest must be personal, or left at the dwelling-house or place of business; if in different places, it must be sent through the post-office to the post-office nearest the party entitled to notice; and where they live in the same place, and the indorser be temporarily absent, notice to bind him must be left at his residence or place of business. *Wilcox v. McNutt*, 2 How. 776; *Walker v. Tunstall*, 3 How. 259.

33. No custom of notaries in serving notices in violation of law, can affect the application of the law or the rights of parties. *Ib.*

34. In a note payable to J. S. as administrator, the words "as administrator" will be mere words of description, and J. S. may maintain the action and recover judgment in his own name. *Carter v. Saunders*, 2 How. 851.

35. See *Jeofails*, 11; how far failure to aver demand and notice cured by statute.

36. See *Abatement*, 2; for plea for non-joinder of all parties to note under act of 1837. That act requiring the holder to sue all the parties to a note in a joint action, in the county where the maker resides, is constitutional; it affects only the remedy. *Rappleye v. Hill*, 4 How. 295; *McMillan v. Sprague*, 4 How. 647.

37. Where a judgment by default was taken on a bill of exchange drawn by one person in this state, on another person in this state, but accepted payable in New Orleans, the clerk can calculate, without the intervention of a jury, the interest and damages fixed by statute for the non-payment of inland bills; and the fact that the bill was protested at the wrong place, if it so appear on the declaration, is cured by the statute of jeofails. *Grisby v. Ford*, 3 How. 184.

38. A bill or note payable to two must be indorsed by both to pass the title to the indorsee; and the indorsee of one cannot sustain an action on the note by the averment that the other payee had released his interest in the note to his co-payee. *Bennett v. McGaughy*, 3 How. 192.

39. Where, by law, the holder of a foreign bill of exchange was entitled to five per cent. damages on the protest of the bill, and the bill was protested; and afterwards, before a suit was brought on the bill, a law was passed, taking off the damages from foreign bills; held, that the holder of the bill would be entitled to the damages allowed when it was protested. *Sadler v. Marrah*, 3 How. 195.

40. Where a member of congress has a residence in the state he is entitled to receive notice of protest, there; and if his residence be

not known, diligent inquiry must be used to discover it; and notice sent to him at Washington city, D. C., will not be sufficient; but if the indorser had no residence in this state, but was known to be in Washington city at the time of protest, notice there would be good. *Walker v. Tunstall*, 3 How. 259. If the indorser have no known residence or known place of business, he is not entitled to any notice to fix his liability; nor in such case is it necessary to prove the exercise of diligence to ascertain his residence, it not having any existence; so also if the indorser at the time of protest, in this state, be in Washington city, a member of the United States senate then in session, in the daily habit of receiving his letters through the post office in Washington, and at his last place of abode in this state, has left no agent to receive or forward letters, notice sent by mail to Washington city, would be sufficient. *Tunstall v. Walker*, 2 S. & M. 638.

41. Where a bill of exchange, not made payable at a particular place, is transferred to a bank, and neither the acceptor nor indorser knew that the bank held it, and no custom proved of depositing of such paper in bank; *held*, that a demand of payment at the counter of the bank would not charge the indorser; the demand should have been personal, of the acceptor. *Lewis v. Planters Bank*, 3 How. 267; *aliter*, if the usage had been established of the negotiation of such paper at the bank. *Ib.* See also *Planters Bank v. Markham*, 5 How. 397.

42. Parties who make negotiable paper, will be bound by the rules and usages which exist in relation to such paper, and will be pre-

sumed to have contracted with reference to them. *Ib.*

43. See *Alteration*, 1, for effect of, on liability of parties.

44. The indorsee of a note may plead the same, as an offset against a suit, by the payee and prior indorser, to recover money due on a different claim, the indorsement being a new and distinct contract to pay the amount of the note indorsed to the holder, whether the indorser be surety or not; and this right is not changed by the law of 1837, which requires all the parties to be jointly sued. *Pease v. Turner*, 3 How. 375.

45. See *Evidence*, 176, 177, memoranda of deceased notary, evidence and construction of, left to jury. *Barnard v. Planters Bank*, 4 How. 98.

46. Where an indorser dies before the maturity of the note, and the holder is aware of it, it is his duty to give notice to his personal representatives, if he can by ordinary diligence find out who they are; if he cannot do that, or does not know of the indorser's death, notice directed to the indorser will be sufficient. *Barnes v. Reynolds*, 4 How. 114.

47. If a note be indorsed in blank, and before it is filled up the indorser die, the holder of the note may, notwithstanding, fill up the blank to the same extent, as if the indorser were still living. *Ib.*

48. If a note in the course of negotiation return to the hands of the maker it is thereby extinguished, and cannot be again put in circulation. *Ib.*

49. Where an indorser die before the maturity of the note, he cannot be charged in a declaration averring the promise by him in his life-time; it should be laid by his executors. *Ib.*

50. Where S. informed M. that he was about to trade for his note, and asked if M. would have any defence to it; to which M. replied what the note was given for, and said he knew of no defence *then*; *held*, that M. was not precluded from showing a subsequent failure of consideration of the note. *Mc-Murran v. Soria*, 4 How. 154. See *infra*, 82.

51. The fact that a note is made payable at a bank does not preclude the maker from setting up a defence against an assignee of the note, who is an innocent holder. *Ib. Vide Parham v. Randolph*, 4 How. 435. A note payable at a bank is on the same footing with any other note. *Allein v. Agricultural Bank*, 3 S. & M. 48.

52. See *Pleading*, 57; for effect of non assumpsit sworn to, plead to action on note.

53. If on inquiry the holder of paper cannot ascertain the residence of the indorser, the place of the date of the bill is the proper one to send notice to; and if the indorser has changed his residence since the execution of the bill, and the holder do not know it, notice sent to his former residence will be good; otherwise if the holder know of the change. *Wilcox v. Mitchell*, 4 How. 272.

54. Where, in a joint action under the law of 1837, the maker and indorsers of a note were sued, and the court instructed the jury that if they were satisfied the first indorser was not duly served with notice, then they must find for the second indorser, even though duly notified; *held*, that the instruction was erroneous; the discharge of the first did not operate a release of the second indorser. *Ib.*

55. Under the act of 1836, jus-

tices of the peace are notaries public, and authorized to protest bills and notes. *Ib.*

56. In a joint action under the statute, the plaintiff may discontinue as against the first indorser, and take judgment against the second and maker by default. *Vickery v. Rester*, 4 How. 293.

57. When a judgment by default is taken on a promissory note, the note itself must be produced; but to show that it was not produced, that fact must be spread upon the record, as the note is not a part of the record of itself. *Ib.*

58. Joint notes are included in the act of 1837, requiring all the parties to a bill or note to be sued in one action. *Lynch v. Commissioners of Sinking Fund*, 4 How. 377. *Sed aliter*; they are not so included. *Thompson v. Planters Bank*, 2 S. & M. 476.

59. Notes under seal are entitled to days of grace, and are negotiable by statute. *Skinner v. Collier*, 4 How. 396.

60. The protest of bills of exchange must be made out and certified that the bill was presented for acceptance or payment by the notary himself; it cannot be done by his agent. *Carmichael v. Bank of Pennsylvania*, 4 How. 567; *Ellis v. Commercial Bank of Natchez*, 7 How. 294.

61. It is not necessary to present a bill payable at a given time after date, for acceptance, but if presented and acceptance refused, the bill must be protested and notice given, or the parties will be discharged. *Ib.*

62. Where bills of exchange payable at a fixed time after date, were enclosed by letter to the drawee before they were due, and he notified the holder that they

were not accepted, it was *held* a sufficient presentment and refusal to accept; presentment need not be made by a notary; it can be made by anybody; but the notary must present the bill also before his protest is made. *Ib.*

63. Whether the conversations of an indorser amount to a waiver of notice of protest, is a question of fact for the jury, and not of law for the court. *Ib.*

64. See *Usury*, 1, for effect of calculating interest on notes by Rowlett's Tables.

65. See *Contract*, 32; defence of failure of consideration, existing to old note, may be made to note given in renewal of it.

66. The record of a notary, of the protest of a note and notice to the indorsers subscribed by the notary, with his oath before a justice of the peace of its truth, appended to it, is, under the statute, evidence of such demand and notice, and where the notary is dead it is evidence at common law. *Ogden v. Glidewell*, 5 How. 179. It is not evidence, if the notary be living, unless verified by oath. *Dorsey v. Merritt*, 6 How. 390. And it makes no difference whether such record be made out at the time of protest or not; the notarial certificate of a note protested on the 16th of March, 1839, which was made out, certified and sworn to on the 20th day of April of the same year, will be evidence under the statute. *Fleming v. Fulton*, 6 How. 473. So also it is good if made out two years afterward. *Grimball v. Marshall*, 3 S. & M. 359. So also even though it be proved that such notarial certificate was the only record ever kept by the notary of his acts in the premises. *Booth v. Watson*,

5 S. & M. 295. Such record is not, however, evidence under the statute, in the county where the notary resides. *Street v. Kellogg*, 7 How. 342. And where it appears by the certificate that the notary is a citizen of the county where the suit is pending, a general objection to its admissibility will be sufficient, without specifying the particular ground of the objection; but if it were read without any objection below, no objection could be taken to it in the high court. Such notarial records are not conclusive; they may be impeached; the *protest* under the statute is conclusive evidence of the protest; but the notary's certificate serves but the office of ordinary deposition, and is in no respect on higher ground, and may be impeached by showing that the notary was not entitled to credibility; or by showing particular facts with reference to the notary's mode of preparing and making out his certificates, and altering his records and preparing *blank affidavits* to be appended to each case as they might be needed. *Wood v. American Life Ins. Co.* 7 How. 609. The notarial records of notaries in other states, made out according to our act, are not evidence in this state; our statute applies only to the notaries of this state. *White v. Englehard*, 2 S. & M. 38.

67. A promissory note drawn by A. as principal, and B., C. and D. as sureties, made payable to a bank for the purpose of being discounted by that bank, to raise money for the accommodation of the principal, and which the bank refused to discount, is passed by A. to E., who advanced to A. a sum of money on it; *held*, that E. could recover against A. and the

sureties to the note, in action at law against them on the note in favor of the bank for his use. *Commercial Bank of Natchez v. Claiborne*, 5 How. 301. And where a note is made payable to a bank, though it never belonged to the bank, the holder may sue on it in the name of the bank for his own use, and show by proof that the bank never owned it. *Graves v. Mississippi & Alabama Railroad Co.* 6 How. 548. And may thus resist an offset of the notes of the bank to which the note sued on is payable. *Tribble v. Bank of Grenada*, 2 S. & M. 523.

68. Where a note is made payable at a bank-house, the usage and customs of the bank, with reference to notes payable thereat, constitute a part of the contract; where, therefore, by the usage of a bank, all persons, having notes payable there, are allowed until the expiration of banking hours for payment, a demand of payment at the bank on the day of the maturity, during banking hours, and before their expiration, is insufficient; unless the note is permitted to remain in bank until the close of the banking hours. *Planters Bank v. Markham*, 5 How. 397. This custom is as obligatory on the one party as on the other; where, therefore, it was the custom of the bank to consider notes dishonored that lay in bank all the day of maturity without any formal demand of payment; no demand will be necessary to bind the indorsers. *Cohea v. Hunt*, 2 S. & M. 227. *Semble, Smith v. Gibbs*, 2 S. & M. 479. Notes made payable at banks being thus governed by the customs of the banks, a greater strictness ought to be ob-

served in making demand of payment at a bank than is necessary in personal demands; a personal demand may be made at any time during the day, but one at a bank must be made at the close of banking hours, because the maker has until that time to deposit the money for the payment of the note; it is not necessary that the note should be deposited in the bank at which it is payable; if it be presented there at the close of business hours it will be sufficient; the law does not prescribe impracticable rules; it is not therefore absolutely essential that the note shall be presented at the very moment of closing the doors of the bank; probably a few minutes would be regarded as of little consequence in the application of the rule; where, therefore, the notary testified that he had no recollection of the fact or time of presentment, except from his protest, from which he had no doubt that he did present the note; that when he protested the note his habit was to make demand of payment *about* the close of banking hours, believing that practice to conform to the law; when payment was refused he took the note away with him; he could not say whether the note was presented an hour or a minute before the close of the bank except from his habit: *held*, that the testimony should have been left to the jury for them to say whether the demand on the note had been made about the close of banking hours. *Harrison v. Crowder*, 6 S. & M. 464. The instruction of the court, therefore, in such a case, that "a demand of payment in some reasonable or convenient time before the doors were closed would be sufficient," would be erroneous. *Id.*

69. Under the statute of this state, of 1837, requiring the holder to sue the drawers and indorsers of negotiable instruments in one action, to be brought in the county where the maker resides, or if he is out of the state, where the first indorser resides; the plaintiff cannot, in a suit on a note against maker and indorsers after process served, discontinue as to the maker, and take judgment against the indorsers. *Wilkinson v. Tiffany*, 5 How. 411; *Boush v. Smith*, 2 S. & M. 512.

70. An indorsement on a note may be stricken out, even at the trial, if necessary. *Planters Bank v. Chewning*, 5 How. 413.

71. L. made his note payable to C. & D., who indorsed it to E., who indorsed it to F. & D., who indorsed it to C. & M., who indorsed it to P., who sued all the parties to the note except C. & M., their indorsement being erased from the note; D. being a member of the firm of C. & D. and of F. & D.; and C. being a member of the firm of C. & D. and of C. & M.; it was *held* by the court that P. could maintain the action against them all; and that the case was not analogous to those in which indorsers are discharged, by the note falling into the hands of the maker or prior indorser. *Ib.*

72. Where the maker of a note, when first applied to by one about to trade for it, answered that the note was given for a tract of land, and there was some difficulty about the title, and would not admit the validity of the note, upon which the party refused to trade for it, and subsequently the maker informed the party about to become assignee that the difficulty was removed, and the note would be

paid; *held*, that such maker thereby waived any defence he might have against the note in the hands of such assignees. *Land v. Lacoste*, 5 How. 471.

73. It is not material in what precise form of words the notice of non payment is conveyed to the indorser; it will be sufficient if it put him on the inquiry; where, therefore, a notary having testified to the demand, testified also that on the same day he gave notice thereof to the indorser; *held*, on demurrer to the evidence, that the court would infer a legal notice had been given. *Chewning v. Gatewood*, 5 How. 552.

74. The assignee, by indorsement in blank of a note, may sue the maker and other indorsers upon it without filling up the blank. *Ib.*

75. M. & E. bought a piece of ground of W., and before executing their notes they sold half of it to H. and agreed with W. to execute their note indorsed by H. for the half they kept, and for the half H. took, H.'s note indorsed by them, which was agreed to and done; M. & E. being sued on their indorsement on H.'s note, it was *held*, that they were entitled to notice of the demand on, and refusal of, H. to pay the note. *Moore v. Brungard*, 5 How. 557.

76. The words "in liquidation" added to the signature of a firm to a note, form no part of the note and need not be noticed in the declaration. *Fairchild v. Grand Gulf Bank*, 5 How. 597.

77. In an action on a note against the members of a firm as principals and others as sureties, if one of the partners plead non assumpsit under oath; it will be equivalent to denying the partnership, and if there be no proof of his being a

partner, the jury must find for him ; but if the others plead the general issue, they thereby admit the partnership and the execution of the note, and they will be held liable notwithstanding the discharge by the verdict of the jury of the one who plead under oath. *Ib.*

78. See *Evidence* 217 ; how far joint maker of a note is a competent witness for the indorser where they are all sued in one action.

79. Where C. & J. are sued as indorsers and partners, and they plead the general issue not under oath, it is incompetent for them to show that J. indorsed the note for the accommodation of the makers, without the consent of C. who was not therefore bound by it. *Wade v. Stanton*, 5 How. 631.

80. The accommodation indorser of a bill of exchange, who has given the holder notice to sue the drawer, and the holder fails to sue the drawer until he becomes insolvent, is not by such neglect discharged from his liability on the bill ; the holder of the bill has a distinct right against each party to it, and may enforce it against any one or all, by the common law, and might sue the accommodation indorser alone, without suing the drawer. *Bullitt v. Thatcher*, 5 How. 689.

81. The statute of 1837 requiring all the parties to a bill of exchange to be sued in one action, does not apply to the case of a bill where the drawer is a non-resident. *Ib.*

82. By the statute in this state, authorizing the makers of notes to plead failure of consideration, &c. to them, in the hands of assignees, which happened previous to notice of the assignment, notes are placed on a footing with bonds at the com-

mon law ; and the right to make the defence may be waived by the maker ; where therefore a party about to purchase a note went to the maker to ascertain if he could be safe in so doing, and was answered that the note was good ; that there was no difficulty about it, and that it would be paid at maturity, it was held, that the maker could not set up a failure of consideration to the note in the hands of an innocent holder, who received it on the faith of such promise ; even though the maker did not know that the consideration of the note had failed at the time he gave the assurance of payment ; but in such case it must appear that the maker had reason to suppose that the person who made the inquiry made it with a view to purchase the note ; which is a fact that may be proved by circumstantial testimony. *Hamer v. Johnston*, 5 How. 698. So also if the maker admit his liability and promise to pay, and the assignee thereupon trades for it, he cannot set up a failure of consideration. *Montgomery v. Dillingham*, 3 S. & M. 647. Assurances of payment made to the assignee before assignment, will be a waiver. *Ayres v. Mitchell*, 3 S. & M. 683.

83. Where two separate suits were brought against the drawer and indorser of a promissory note, and judgments had and forthcoming bonds given in each case, the bond against the maker having been given and forfeited prior to that by the indorser, the forfeiture of the bond against the maker will not operate as a satisfaction of the judgment against the security, inasmuch as the judgments were separate and in separate suits ; but the rule would be different when

the judgment is joint on a joint or a joint and several liability. *McNutt v. Wilcox*, 3 How. 417.

84. Where parties are sued as the makers of a note, it is competent for them to show that a bond was executed by the same parties, payable to the same parties, for the same sum, of the same date, conditioned for the delivery by the obligors, who were also makers of the note, of cotton to the obligees, being the payees of the note; it will be left for the jury to say, whether the bond was given for the same debt secured by the note; if it was the note would be *prima facie* merged in the bond, as a debt of higher dignity; and, in order to sustain the action on the note, the plaintiffs would have to show that the bond was taken merely as collateral. *Myers v. Oglesby*, 6 How. 46.

85. A note for the payment of four hundred and ninety-five dollars, in cotton, at twelve cents per pound, at a future day, and at a particular place, is a promissory note, and may be declared on as such; the maker has the privilege of discharging it in cotton; if the holder sue upon it as a promissory note, alleging as a breach a failure to pay, and the defendant demur, the judgment will be final on the demurrer, without the intervention of a writ of inquiry and a jury. *Rankin v. Sanders*, 6 How. 52.

86. Where the payee of a note wrote his name immediately under the maker's, and passed the note off to a third person, in a suit on the note against the payee as a joint maker, it will be a good plea in bar of the action that he signed the note for the purpose of transferring and indorsing it, and as indorser, and not maker; for a party may indorse

a note on its face, as well as on its back; and on proof that the party signed it as indorser he cannot be charged as maker. *Gibson v. Powell*, 6 How. 60.

87. Where a note has been changed since its execution, by altering the time of payment from the year 1837 to the year 1838, without the consent of the parties making it, they will be discharged, and such alteration operating as a discharge by matter subsequent to the execution of the note, it is not necessary to deny the execution of the note, under oath; the evidence of alteration may be given under the ordinary plea of non assumpsit. *Henderson v. Wilson*, 6 How. 65.

88. Days of grace, like interest, are incidents to a promissory note; where, therefore, a bank was authorized to discount notes, having four months to run, at seven per cent.; a note due at four months, excluding the days of grace, will be included in the four month notes. *Forniquet v. West Feliciana Railroad Co.* 6 How. 116.

89. The maker of a note, against whom a judgment has been rendered, is a competent witness in a suit between the indorsee and indorser of the same note, to prove that it has been paid. *Routh v. Helm*, 6 How. 127.

90. An indorser, who receives from the maker of the note a mortgage, as indemnity for the indorsement, thereby dispenses with the necessity for the proof of demand and notice, to bind him; and in such case it is not competent for the indorser to show that the indemnity was insufficient; especially where the indorser, before suit brought, voluntarily relinquished a great part of his security. *Watt v. Mitchell*, 6 How. 131.

91. Where A. had, during the absence of B. from the state, been his agent, under power of attorney, to attend to all his business, and after B.'s return had been in the regular habit of receiving at the post-office all letters for B. and taking them to his own office, where B. called regularly to receive them, and A.'s authority had always been acquiesced in, and he had sometimes opened letters to B. and attended to them, and had occasionally received notices of protest for B. and handed them to him, and the jury had rendered a verdict against B., in a suit on a note indorsed by B., where the notice of protest had been handed to A. who could not state that he had received and delivered the notice to B., but said, if it had been delivered to him he gave it to B.; *held*, the jury having passed on the agency of A., this court could not disturb the verdict. *Wilkins v. Commercial Bank of Natchez*, 6 How. 217.

92. J. L. and T. F. were sued as makers of a note, dated "Commercial Bank of Rodney, Rodney, Miss.;" marked "post note," and promising to pay one hundred dollars, six months after date, to W. or bearer, "at the bank in Rodney," and signed "T. F., President;" and countersigned "J. L., Cashier;" the defendants plead non assumpsit; *held*, that the note was *prima facie* a good cause of action against J. L. and T. F. and should be admitted to the jury as such, subject to be explained. *Fitch v. Lawton*, 6 How. 371.

93. To a note made by B. and S. and M. and others, payable to D. S.; a suit was brought in the name of D. S., use of P., against B. alone, who plead in abatement that P., the usee, was jointly liable

for the payment of the debt; the note having been given for a partnership matter, and P. having assumed the place of S. in the partnership, and agreed to pay his share of the debts, and that D. S. had no interest in the note; *held*, that the plea was bad, in form and substance, it should have been in bar, not in abatement; and presented no defence to the action at law in favor of D. S., for the use of P.; for though P. might in equity be jointly liable for part of the note, it was not a joint legal liability, and therefore P. did not stand in the attitude of both plaintiff and defendant at law. *Stone v. Brooks*, 6 How. 373.

94. Where the suit is commenced jointly, under the statute of 1837, against the makers and indorsers of a promissory note, and the maker has given a forthcoming bond, the indorser is not thereby estopped from prosecuting his writ of error, to reverse the judgment as to him. Whether such judgment would be binding on the indorser, after the forfeiture of the maker's bond, *quære?* *Dorsey v. Merritt*, 6 How. 390.

95. Where the third day of grace falls on Sunday, payment of the note should be demanded on Saturday, and notice given on Monday will be in time. *Fleming v. Fulton*, 6 How. 473; *Barlow v. Planters Bank*, 7 How. 129.

96. Where there is no contrariety of testimony, it will not be irregular for the court to instruct the jury that the evidence of demand and protest adduced was sufficient to charge the indorsers. *Ib.*

97. Where a note was payable at a bank which had regular banking hours, and the notarial record, offered in evidence of protest, stated

that on such a day, without naming the hour, demand was made, it was *held* that the notary, being a sworn officer, made the demand at the legal time, in the absence of any evidence shewing to the contrary. *Ib.*

98. In this state promissory notes are entitled to three days of grace. *Ib.*

99. An order by A. in favor of B. upon C., to pay a certain sum of money out of a particular fund, is not a bill of exchange, but is an equitable assignment of so much of the fund, and in equity the assignee will be protected, even though the bailee or debtor had not assented thereto; much more so if the debtor has assented. *Fitch v. Stamps*, 6 How. 495.

100. And it seems where such an order is drawn and accepted, the assignee will not be compelled, in a suit against the acceptors, to prove the consideration of the order; our statute making all instruments for the payment of money assignable, changes the rule on the subject and requiring the acceptor to shew a failure of consideration, if any. *Ib.*

101. A note made by A. payable to B. at a Bank, is not thereby made payable in the notes of such bank, and a tender of such notes will not be a legal tender. *Bull v. Harrell*, 7 How. 9.

102. Where a note was made payable "*twenty four after date*," and the declaration on it averred that it was designed to be payable twenty-four months after date; *held* that the note was not void for uncertainty, and was competent testimony, under the declaration, to go before the jury, either by itself or with other proof of the mistake, for them to say whether the mistake was as alleged, and if they so

find on the note alone, without other testimony, their verdict will not be disturbed. *Conner v. Routh*, 7 How. 176.

103. Where a note is made by an agent, in the name of his principal, and the principal is sued; under the act of 1824, if he wish to deny the agency, he must do so by plea supported by affidavit; the plea of general issue admits the execution of the note, whether the party defendant be the maker of the note or his administrator. *Ellis v. Planters Bank*, 7 How. 235; *Hemphill v. The Bank of Alabama*, 6 S. & M. 44.

104. If the holder of a protested bill or note place the notice of protest in the post office in due time, it is legal diligence, and he is not responsible for any defects in the regulation of the mails, or for the time which elapses from its deposit in the office and its delivery. *Ellis v. Commercial Bank of Natchez*, 7 How. 294.

105. The agent of the holder is allowed one day to give notice to his principal of a default, and the principal to one day after he receives the notice, to give or forward notice by mail to the drawer or indorser. *Ib.*

106. Whether the statement of the notary that "he went to the counting house of the acceptor, found it shut up and no person there to answer for the payment," is a legal excuse for not making demand, without proof of inquiry in the neighborhood? *Quære? Ib.*

107. Must the demand and protest of a note be made according to the law of the place where the bill is payable? *Ib.*

108. Where a note is payable in current bank notes, the measure of damages is the value of the cur-

rent notes, in specie, at the time payment should have been made. *Bonnell v. Covington*, 7 How. 322; *Jennings v. Summers*, 7 How. 453; *Gordon v. Parker*, 2 S. & M. 485; *Lanier v. Trigg*, 6 S. & M. 641.

109. Where to a suit, on a note payable in the *current* bank notes of a particular bank, the defendant plead a tender of the notes of that bank, the plea will be bad if it do not aver that such notes were *current* at the time. *Ib.* The plea will be bad if it do not aver a tender at the time the note matured, because the value at *that time* is the measure of damages, and a tender in notes at a subsequent time will not be good; the plea must also aver a continual state of readiness to pay the sum due, since the tender; for though the defendant, under such averment, may not be able to show its truth, yet its introduction enables the plaintiff to show, if the fact be so, that upon a subsequent demand, the defendant had failed to pay, which would defeat the defence. 6 S. & M. 641.

110. See *Set-off* 11, for what is sufficient set-off against payee where a note has been assigned, and what is evidence of assignment.

111. Inland bills of exchange, possessed previous to notice of the assignment, are included in the statute which allows set-offs, they being embraced in the words in the statute, "*all other writings for the payment of money.*" *Kershaw v. Merchants Bank of N. Y.*, 7 How. 386.

112. See *Set-off*, 11; where the acceptor of a bill was allowed, as an offset to a suit by the assignee of the payee, his liability for the payee under a levy on the acceptor's slaves, by virtue of a judgment against the acceptor, as surety

for the payee, on a different debt; the levy being made previous to notice of the assignment. *Ib.*

113. Whether, in an action on a joint note, one of the defendants may obtain a separate trial from the others: *Quære? Commercial & Railroad Bank of Vicksburg v. Lum*, 7 How. 414.

114. The joint maker of a note, who is sued with his co-makers, is not a competent witness for one of his co-makers who has obtained a separate trial, without a release from his co-makers, of their claim to contribution; he is also incompetent, as being liable for costs. *Ib.*

115. Whether the alteration of a promissory note was made before or after execution and delivery, is a question of fact for the jury; but if the alteration appear on the face of the note, the presumption of law is, that it was made after delivery, and the holder must prove that it was altered under circumstances which will make it still available. *Ib.*

116. A bank which receives a note or bill for collection, is bound to use due and proper diligence in making demand and giving notice so as to hold all parties liable, and in default of such diligence, the bank becomes liable to the party who deposited the note. Whether delivering such a note to a notary in proper time, is sufficient; *quære? Commercial and Railroad Bank v. Hamer*, 7 How. 448. See the case of *Tiernan v. The Commercial Bank of Natchez*, 7 How. 648; where the question of the liability of the bank which had placed a bill lodged with it for collection in the hands of a notary to protest and give the regular notices, and the notary had failed to do so; it was *held*, that the bank was not liable; the

notary was a public officer whose duty it was to make demands and give notices ; and the bank being an agent with power to appoint a sub-agent would only be liable for not selecting a proper person for such sub-agent ; but the notary *virtute officii*, is a proper person. A bank which receives a note for collection, and places it in the hands of a notary in time for demand and protest, is not liable for any loss on account of the negligence of the notary ; in undertaking the collection of the note, the bank becomes the agent of the owner, and is bound to use only reasonable skill and ordinary diligence, and when the note is placed in the hands of a notary for demand and protest, the notary becomes a sub-agent, for whose negligence the agent is not responsible if he has used reasonable diligence in his choice as to the skill and ability of the sub-agent ; and in an action against a bank for neglecting to make demand and give notice of non-payment of a note left with it for collection, on proof that it delivered the note to a notary, the bank is *prima facie*, exonerated from liability, and to rebut such *prima facie* case it is not sufficient for the plaintiff to prove in general terms that the notary was a man of dissipated habits ; he must establish the negligence more definitely by proof that the notary was drunk at the time the note was given to him, or that his habits were so universally intemperate as to disqualify him for the discharge of an official act. *Agricultural Bank v. Commercial Bank of Manchester*, 7 S. & M. 592.

117. Where a note was payable at a bank, and the notary did not make demand during banking hours, but afterwards, when the

front door of the bank was closed, went in at the back door, and finding the teller in the bank, demanded payment of him, who refused it, stating that there were no funds there for that purpose, and there had been none during the day ; *held*, to be a good demand of payment. *Ib. Cohea v. Hunt*, 2 S. & M. 227.

118. He who signs a bill or note in blank, and delivers it to another, makes him his agent, and authorizes him to fill it up with any sum ; if the party making the blank signature, authorize it to be filled up with a limited sum, and the holder exceed the authority, and a third person receive the note with the knowledge that the authority was limited, and had been transcended, the note will be void only as to the excess ; it will be valid for the sum authorized. *Johnson v. Blasdale*, 1 S. & M. 17 ; *Hemphill v. Bank of Alabama*, 6 S. & M. 44.

119. A. signs a note in blank as surety for B., and authorizes B. to fill it up with the amount of B.'s intended purchases from C., provided it do not exceed a certain sum ; B. makes a purchase, and fills up the blank with the amount of his own purchase, and of D.'s purchase from C. also ; B. and D.'s purchases combined, being within the limit fixed by A. ; C. having full knowledge of the nature and extent of B.'s authority ; *held*, that as to A. the consideration of the note had failed to the extent of D.'s purchase only, and that these facts create no presumption of fraud on the part of C. to prevent his recovery against A. to the extent of B.'s purchase. *Ib.*

120. An assignee is affected by the fraud of his assignor, and takes the note subject to it ; as where the

assignor of a note given him for land had made a fraudulent representation of title. *Barringer v. Nesbit*, 1 S. & M. 22.

121. See *Evidence*, 124; correspondence of dates and amounts between note and certificate of stock, evidence that one was the consideration of the other.

122. See *Usury*, 15; where note payable in Louisiana, bears ten per cent. interest.

123. A bank may indorse a note by its cashier. *Harper v. Calhoun*, 7 How. 203; *Crockett v. Young*, 1 S. & M. 241.

124. In order to constitute a sufficient notice to charge an indorser if it is to be sent by mail, it must at farthest, be put into the post-office in time to go by the mail of the day next succeeding the protest, if there be a mail which goes on that day, and if not then by the first mail which goes afterward; the notice need not be put in the post-office on the same day the note is protested, but must be on the next day in time for the mail of that day, unless it leave at an unusually early hour. *Downs v. Planters Bank*, 1 S. & M. 261. Sunrise is an unreasonably early hour. *Deminds v. Kirkman*, 1 S. & M. 644. *Hoopes v. Newman*, 2 S. & M. 71. So also where the mail is closed the night of the day of protest, that leaves the morning after, the notice need not be sent by that mail. *Wemple v. Dangerfield*, 2 S. & M. 445.

125. The holder of a note must prove distinctly and by positive proof, everything to charge the indorser; proof, therefore, that notice was sent by mail to an indorser by nine o'clock of the day succeeding the protest, without showing that no mail went out on that day, at an earlier hour, is insufficient to

charge the indorser. *Downs v. Planters Bank*, 1 S. & M. 261.

126. The note is not part of the record, but must be made so by bill of exceptions; the certificate of the clerk that the note differs from the one described will not be regarded. *Barfield v. Impson*, 1 S. & M. 326.

127. The surviving maker of a note cannot be sued jointly with the executor of the one who died. *Poole v. McLeod*, 1 S. & M. 391.

128. An order payable out of a particular fund, is not a bill of exchange. *Van Vacter v. Flack*, 1 S. & M. 393.

129. In an action against the acceptor of an order payable out of certain notes in the hands of the acceptor for collection, the plaintiff must aver and prove the collection of the notes. *Ib.* If the acceptor collect the currency of the state, which afterwards depreciates, it will be no defence to offer to pay the money collected, to the holder of the order; the holder will be entitled to collect par money. *Van Vacter v. Brewster*, 1 S. & M. 400.

130. Where the makers of a note had delivered forty bales of cotton to the holder, in part payment of the note, in absence of proof of a special contract, the makers may prove the market value of the cotton at the place of delivery; *aliter* if there had been a special contract. *Phillips v. Commercial Bank of Manchester*, 1 S. & M. 636.

131. See *Bank*, 21. Where note is payable to bank, proof that its notes at maturity were below par, inadmissible.

132. A note signed by A. B. and C. D., *guardians*, may be sued upon as the individual note of A. B. and C. D. *Robertson v. Banks*, 1 S. & M. 666.

133. If after reasonable diligence

on the part of the holder, the residence of the indorser cannot be ascertained, an excuse is furnished for a failure to give notice; the question of diligence must be determined by the jury from the evidence. *Hoopes v. Newman*, 2 S. & M. 71.

134. Whether, if the declaration aver that notice was given to the indorser, proof that diligent search was made for his residence in vain, will support the averment; *quare?* *Ib.*

135. See *Defeasance*, 1. Where note is given for land, and the deed provides the note may be paid in bank notes, it is a defeasance, and must be strictly complied with.

136. Where the record of a deceased notary contained these words, "Notices to J. G. Post," held, that they were properly admissible to the consideration of the jury to prove notice of protest to J. G.; but the clerk of the notary cannot be permitted to show what meaning the notary intended thereby. *Duncan v. Watson*, 2 S. & M. 121.

137. A letter from the defendant, sued as the indorser of a note, on the subject of arranging a note, without specifying what particular note, with the plaintiff, is competent testimony, with other proof, for the consideration of the jury on the question of notice. *Ib.*

138. Where an executor or administrator is sued upon an indorsement of a note made by his testator or intestate that matured after his death, and since their appointment, it is competent to prove the admissions of such executor or administrator, that he received notice of the protest, unless the executor or administrator is in readiness at the time of trial and announces his willingness to testify in the case. *Ib.*

139. No demand and notice are

necessary to fix the liability of the guarantor of a note. He must prove negligence on the part of the holder, and consequent damage to himself, to entitle him to a discharge; and if such demand and notice are alleged, it is but surplusage and the allegation need not be proved. *Thrasher v. Ely*, 2 S. & M. 139.

140. If all the parties to a note indorsed after maturity reside in or near the same place, should payment be demanded and notice given to the indorser on the same or the next day after the note is received in order to fix his liability? It seems a demand on the next day after is sufficient, and if that day be Sunday, a demand on Monday will be in time. *Fortner v. Parham*, 2 S. & M. 151.

141. The notary, on the day after the note was protested, met the clerk of the indorsers in the streets of the town where they lived, without having called either at their boarding-house or place of business, and gave the notice to the clerk, and requested him to deliver it to them; there was no evidence that their clerk was their agent to receive notices, or that he was in the habit of attending to such business, or that he delivered the notice to them; held to be insufficient notice to the indorsers to bind them. *Ib.*

142. Notice, to be binding, must be given on the same or the day after the dishonor of the note. *Ib.*

143. See *Evidence*, 233; one indorser not witness for the other in joint action under statute.

144. The act of 1837, requiring all the parties to a note to be sued in a joint action, does not apply to a note never indorsed; in such case the holder may sue any one, or more

of the makers. *Thompson v. Planters Bank*, 2 S. & M. 476.

145. The protest of a promissory note is no evidence of the demand of payment of the note, for the law does not require that the note should be protested. *Smith v. Gibbs*, 2 S. & M. 479.

146. A protest stating that payment was demanded, but saying nothing as to presentment, is defective on its face and inadmissible. *Ib.*

147. Where it is in proof that the notary's clerk made the demand of payment, and the protest states that the notary made it, the protest should be ruled out as evidence, or the jury be instructed to disregard it. *Ib.*

148. Where the clerk of the notary testified that he made the demand of payment of the note sued on, without specifying how or when, it was *held* not to be sufficient evidence of a legal demand. *Ib.*

149. Where all the parties to a note are sued, and the declaration is good against the maker but bad against the indorsers, and is demurred to, the plaintiff, on discontinuing as to the indorsers, will be entitled to a judgment on the demurrer as against the maker. *Kirk v. Seawell*, 2 S. & M. 571.

150. The payment of a note by the maker to the payee without its production and delivery, in the absence of notice of its assignment, is a valid payment; but if the payee or holder, after such payment, assign it, he will be liable to the assignee, though the maker and any previous indorser would not be. *Allein v. The Agricultural Bank*, 3 S. & M. 48.

151. It is incumbent on the holder of an indorsed note, before he can charge the indorsers, to prove demand and notice with a reasona-

ble degree of certainty; positive proof is never absolutely required. *Bland v. Com. and Railroad Bank*, 3 S. & M. 250; yet the fact of notice must be affirmatively proved, and not left to inference or presumption. *Am. Life Ins. and Trust Co. v. Emerson*, 4 S. & M. 177.

152. Where the notary who protested the note was dead, and a witness testified that at the request of the notary, about the time the note sued on fell due, he gave personal notice to the indorser of the non-payment of some note, made and indorsed by the persons sued, the precise date and amount of which he could not recollect, on the day it was protested, it was *held*, with proper evidence of demand, sufficient to uphold a verdict for plaintiff. *Bland v. Com. and Railroad Bank*, 3 S. & M. 250.

153. Upon a note given at par for money then at a discount, the full amount cannot be recovered, and the defendant may compel the plaintiff to disclose the consideration of the note by bill of discovery. *Scott v. Hamblin*, 3 S. & M. 285.

154. In an action on a lost note in the name of the payee, for the use of a third party, where the defendant pleads, on oath, that the usee has no right, title or interest in or to the note sued on, it is necessary for the usee to prove his interest before he can recover. *Moore v. Anderson*, 3 S. & M. 321.

155. As between the assignee and maker of a note, it is immaterial what the assignee gave his assignor for it; and if proof is allowed on that point to go to the jury and is excepted to, it will be error, and the judgment will be reversed. *Turner v. Brown*, 3 S. & M. 425.

156. See *Banks, &c.*, 27; act

prohibiting banks to assign their notes constitutional.

157. Where the payee of a note has assigned it, and the maker has not paid it at maturity, the payee can take the note up and sue the maker thereon, and any claim the maker has against the assignee will not be an offset against the payee, as the statute allowing the maker the benefit of all offsets, &c., previous to notice of the assignment, did not extend to the assignee; and it would make no difference if such assignee were a bank; the notes of the bank, though held by the maker previous to the maturity of the note, and while it was the property of the bank, would be no offset against the payee. *Maury v. Jeffers*, 4 S. & M. 87.

158. See *Execution*, 57; for the duty of the sheriff in levying execution on the property of the parties to a note or bill, according to their position, and for a construction of the act of 1837, thereon.

159. A bill of exchange was protested in New York on the 18th of February, and the notices of protest enclosed to the last indorser, who was the holder for collection at Natchez, in this state, who received them on the 3d of March, ensuing, and on the 6th of that month gave the prior indorser personal notice; *held* insufficient; it should have been given on the fourth. *American Life Insurance and Trust Company v. Emerson*, 4 S. & M. 177.

160. Whether, where the holder of a bill residing in this state sends the bill to a distant state where it is payable, for payment, and it is protested, and the indorser resides neither in this state nor the one where the bill was protested, the notary can transmit the notices of

protest to the holder in this state to be by him forwarded to the indorser, or must forward them himself. *Quære. Ib.*

161. See *Partner*, 22; an agreement by one partner to acknowledge notice in a particular way will bind his co-partners.

162. Notice to one partner of the non-payment of a note indorsed by the firm is notice to all; so also notice to a surviving partner will entitle the holder of the note to recover in an action against the representatives of the deceased partner, even though the deceased partner was dead before the maturity of the note and the holder knew that fact. *Dabney v. Stidger*, 4 S. & M. 749.

163. Joint payees who severally indorse a note, are each entitled to notice of non-payment. *Ib.*

164. A notice of protest describing the note protested as one dollar less in amount than it really was, but in other respects properly describing the note, is sufficient to uphold the verdict of a jury against the indorser, predicated on such notice; but whether a notice barely sufficient in its description to put the indorser on the inquiry or which describes the note properly in other respects but states a demand on the wrong day, will be sufficient. *Quære. Rowan v. Odenheimer*, 5 S. & M. 44.

165. The deposition of a notary that he protested a note, in all respects similar to the one sued on, except that the notary described it as for one dollar greater in amount than the one sued for; that on the day after the protest he gave the indorser notice by leaving it at his store, but he could not say at what hour of the day nor with whom; that he had a record of his notarial action made out by his clerk, who

might also have written the notice of protest, as he had no recollection of it, nor of ever having compared it with the note protested; that his notarial record was signed by himself, though filled out by the clerk, who was in the habit, when the witness returned from giving notices, of writing down what he had done, when the witness would sign it; and that his statement of the time of the service of the notice of protest was based on his usual practice and not on recollection; *held*, that the testimony was sufficient to uphold a verdict against the indorser. *Ib.*

166. In an action upon a lost note, the affidavit of the plaintiff, of its loss, though competent as addressed to the court, to lay the foundation for the introduction of secondary evidence of its contents, is incompetent as proof to support the issue before the jury; but if such affidavit be read and there be ample other proof of the character and contents of the note before the jury, the error will not vitiate the verdict. *Davis v. Black*, 5 S. & M. 226.

167. Where the maker of a note promised the holder to pay it, such promise dispenses with proof of title in the holder, and is *prima facie* evidence of ownership in him; where, therefore, in an action by B. against D. on a lost note, G. testified that he had indorsed the note in blank to S. and B.; and H. testified that after the indorsement to S. and B., D. promised to pay B. the note; *held*, that D.'s promise was sufficient evidence of B.'s right to the note and of his having procured an assignment of S.'s interest. *Ib.*

168. U. the payee of a note made by S. indorsed it to W. by the following indorsement: "S. will be so good as to pay the within

note to W.; and if you cannot pay it, settle it with him, as he may wish you to do for me;" U. died a few days after; *held*, that the indorsement was sufficient to enable W. to sue S. in his own name; but whether it was an absolute assignment of the note to W. or merely for U.'s use? *Quare?* *Sims v. Wilkins*, 5 S. & M. 234.

169. A note payable to a firm, and indorsed by but one of the firm, as a general rule, cannot be sued upon by the assignee; but where the maker of the note and the indorser are sued together, and the maker of the note makes no objection to the suit, and proof is made that the indorser indorsed it after maturity, and promised to pay it, *held*, that the action as against the indorser could be maintained by the indorsee; where, therefore, T. made his note payable to M. and A. jointly, which was indorsed by A. alone to S. M., who sued T. and A. in a joint action, and judgment by default was rendered against T. but A. plead; S. M. filed a bill of discovery against A. alleging that A. assigned the note to him after due, and promised he would pay it if T. did not, and promised a second time to pay it after T. refused; which bill was taken for confessed, and verdict rendered against A.; *held*, that the action was well brought as against A., and the assignment after due and promise to pay, dispensed with the proof of demand and notice, and that the verdict was correct. *Moore v. Ayres*, 5 S. & M. 310.

170. An allegation, in a declaration against the indorser of a note, of demand and notice, is sustained by proof of a promise to pay after maturity, by the indorser. *Ib.*

171. A note, payable in the cur-

rency of the state of Mississippi, is payable in specie; to an action, therefore, on such a note, the defendant's plea that he was ready at the time and place to pay the note in the notes of the Mississippi bank, current at the time, with a tender of the notes, was held to be bad. *Mitchell v. Hewitt*, 5 S. & M. 361.

172. A note payable to A. or bearer, is transferable by mere delivery; the holder claims title as bearer, and the indorsement of A. is not essential to enable the bearer to bring suit upon it; if the bearer indorse and transfer it, he is liable as indorser thereon, although the payee has never indorsed it. *Tillman v. Ailles*, 5 S. & M. 373.

173. Where a party is sued in assumpsit as indorser of a note, and pleads the general issue, he thereby admits the character of indorser, in which he is sued. *Ib.*

174. A want of funds in the hands of the drawee when a bill is drawn, dispenses with the necessity of notice to the drawer; and it is not necessary for the holder, in a suit against the drawer, to prove affirmatively that he sustained no damage by failure of notice, even though it is so averred in the declaration; from the fact of no assets the law draws the conclusion of no damage sustained. *Cook v. Martin*, 5 S. & M. 379.

175. Where a note is payable on demand, at a particular place, at a fixed time after date, it is not necessary to make demand at that place before an action may be maintained against the maker; whether the rule would be otherwise if no fixed time were named, *quare*? At all events if the maker were ready at the time and place to pay, on proof of that fact he will be exonerated from costs. *Ib.*

176. Where several notes, maturing at different periods, are secured by a deed of trust, and have past maturity, and a sale of the trust property takes place under the trust, the proceeds of the sale are to be applied ratably to the several notes; where, therefore, C. was sued on an injunction bond, given to enjoin a judgment at law, and plead payment of the whole amount of the judgment enjoined before action brought, and offered to prove that the note sued on was the second of three given for equal sums each, maturing in three consecutive years, and secured by a deed of trust; that a sale of the trust property, after all the notes had matured, had been had, and the proceeds applied by the trustee solely to the third note, which was thereby discharged, which C. contended should have been appropriated to the second instead of the third note; *held*, that the proof was admissible, but that the proceeds of sale should be distributed equally among the three notes. *Cage v. Iler*, 5 S. & M. 410.

177. Where a person, entrusted with a note to place in the hands of an attorney for collection, with instructions to deposit the attorney's receipt, subject to the order of the owner of the note, did place the note in the hands of an attorney, but instead of depositing the attorney's receipt, as instructed, assigned it to a third person, without notice of the fact that he held it in trust only, it was *held*, that the owner of the note was entitled to the money collected on it, in preference to the assignee of the attorney's receipt; and if the attorney, after notice by injunction of the claim of the holder of the note, pay the money over to the holder of his receipt, even

though he do so under a belief that the injunction was dissolved, the holder of the note will be entitled to a decree against him. *Roberts v. Bean*, 5 S. & M. 590.

178. If a person, who is not the payee, put his name on the back of a note, at the time it was made, according to a promise to become originally and directly responsible; or if he participated in the consideration for which the note was given, he must be treated as a joint maker: yet, if his indorsement was subsequent to the making of the note, and he had nothing to do with the original consideration, but put his name on it to add to the security, he will be regarded as a guarantor; but before he can be held liable as either, there must be proof of the circumstances which would authorize his being held liable; where, therefore, a note was sued on as the joint note of E. and O. and T.; E. and O. having signed it on the face, and T. on the back; and there was no other proof but the note itself, it was *held*, that T.'s liability as joint maker was not thereby made out. *Thomas v. Jennings*, 5 S. & M. 627.

179. It seems a joint action cannot be sustained against the makers and guarantor of a promissory note. *Ib.*

180. The plea to an action of assumpsit on a note, that the plaintiff was not the lawful owner or bearer of the note sued upon, at the time of the commencement of the suit is bad, as amounting to the general issue. *Bingham v. Sessions*, 6 S. & M. 13.

181. A plea to an action on a note, that the note was obtained by duress, and setting forth in a detail of circumstances the nature of the duress in the procurement of the

note, is not by such detail, even if unnecessary, vitiated. *Ib.*

182. A plea to an action on a note, that the note was given to obtain the release of certain property levied on by virtue of a certain execution, which was fraudulently issued on a judgment previously satisfied, under which execution the plaintiff threatened to sell the property thus levied on, is bad; a note given to obtain the release of property from an illegal levy is not void; the maker has his redress by action against the judgment creditor, or the option to give the note; if he elect the latter, he is bound by it. *Ib.*

183. A plea to an action on a note, that the note was obtained by duress, through the fraudulent levy of an execution by the plaintiff therein, though bad as a plea of duress, should be so amended by the permission of the court, as to allow the defence arising out of the fraud of the plaintiff, to be made. *Ib.*

184. Whether an action can be maintained in the courts of Mississippi by the bearer of a note, payable to bearer, which note was made in the state of Alabama, where a statute provides, that no one can maintain an action as the bearer of a promissory note? *Quære?* *Hemphill v. The Bank of Alabama*, 6 S. & M. 44.

185. The insolvency of the maker of a promissory note is no excuse for not making demand of payment, and not giving notice of protest. *Reaves v. Dennis*, 6 S. & M. 89.

186. See *Executor and Administrator*, 82, 100. A note given by an administrator for the debt of his intestate is not binding, unless there are assets.

187. See *Pleading*, 173; not necessary, in declaring on a note, to

state for whose use the note on its face purports to have been made.

188. If the holder of a promissory note be ignorant of the place where the indorser resides at the time of protest, and cannot ascertain it after diligent inquiry, notice of protest sent to the place where the note bears date will be sufficient. *Godley v. Goodloe*, 6 S. & M. 255.

189. The question of due diligence, in serving notice of protest, when it depends on the testimony of witnesses before a jury, must be submitted to the jury for their decision, under appropriate charges as to the law, from the court, if the evidence be agreed on by the parties, the question of due diligence is then one purely of law for the decision of the court. *Ib.*

190. If a third party take up a bill for the honor of the drawer, and at his request, at its maturity, he thereby releases the accommodation acceptor of such bill, whether he intended it or not, even though he looked to the acceptors when he took up the bill. *McDowell v. Cook*, 6 S. & M. 420.

191. In an action of trover for a note payable to bearer, the possession by the defendant of the note will be *prima facie* evidence of his ownership, which will not be rebutted by proof that the note formerly belonged to the plaintiff; it would be otherwise if the note were payable to order and not indorsed. *Smith v. Prestige*, 6 S. & M. 478.

192. Where a holder sues on a note, and his title is properly questioned, he must make out his title; but when the holder is sued for a note payable to bearer, his possession will be a sufficient protection until a better title is shown. *Ib.*

193. Where a separate suit was

instituted against an indorser of a bill of exchange, and also a joint suit on the same bill against him and the other parties thereto, and on the same day judgments were rendered in both cases, in the separate suit against him, and in the joint suit for him where he had plead to the action; *held*, that he could have no relief in equity, though the proceedings at law were irregular, as the plaintiff had no right to sue the indorser separately, yet the defendant should have appealed. *Benton v. Crowder*, 7 S. & M. 185.

194. Where the maker and indorser are sued separately since the act of 1837, and the maker gives a forthcoming bond, it will not be a satisfaction of the judgment against the indorser; nothing but an actual payment of the one would be a satisfaction of the other. *Ib.*

195. A court of equity has jurisdiction of a bill to recover of the maker the amount of a lost note; but it seems the court will require a bond of indemnity from the complainant, not only against the note itself, but also against the damages and accumulated expenses of another suit. *Truly v. Lane*, 7 S. & M. 325.

196. A note payable "in the notes of the chartered banks of Mississippi at par," is free from ambiguity, and means that the notes of chartered banks were to be taken as at par, that is without discount or premium, in payment of the note; parol evidence is therefore inadmissible to show in what kind of funds the note was payable; and a plea of tender "in the notes of chartered banks of Mississippi," without averring that they were "at par," is good in an action on such note. *Smith v. Elder*, 7 S. & M. 507.

197. Where A. draws a bill on B. in favor of C. and B. accepts the bill in writing, and is sued upon it, he cannot show by parol evidence that the acceptance of the bill was given to C. to be obligatory upon condition that A. finished a job of work that he had undertaken for B. *Heaverin v. Donnell*, 7 S. & M. 244.

198. W. gave his note to E. in satisfaction of a judgment that R. had obtained against W., of which E. alleged himself to be the owner; the note was not to be obligatory, in case it turned out that E. was not the owner; E. proving not to be the owner, *held*, that W. was not liable on the note. *Brooks v. Whitson*, 7 S. & M. 513.

199. An assignee of a note who receives as an indemnity for a prior liability of the assignor to him, is not a *bona fide* assignee for valuable consideration, and without notice, but takes the note, subject to the equities between the maker and assignor. *Ib.*

200. A court of equity has jurisdiction of a bill filed to recover from the indorsers of a lost note, the amount of it; the basis of equity jurisdiction, in such cases, being the power of the court to compel indemnity; it is not necessary, however, that the indemnity should be tendered before the bill is filed, or the parties themselves; it must, however, be offered on the face of the bill, to give the court jurisdiction; the bill must also be accompanied with an affidavit of the loss of the note. *Smith v. Walker*, 1 S. & M. Ch. 432.

201. Where a note made for discount at a bank is made payable to the banking company, and is signed by G. as principal, and H. and others as sureties, and the bank refuses to discount it, and the note is

afterwards passed to W. in payment of the debt of some third person, neither principal nor surety to the note, and without their assent, W. having full knowledge of the object of the creation of the note: *Held*, that the note in the hands of W. was not obligatory upon the surety. *Herring v. Winans*, 1 S. & M. Ch. 466.

202. Where a note is payable to a banking company, and is taken by W. without indorsement from the payees, W. is affected with all the equities of the makers of the note. *Ib.*

203. See *Chancery*, tit. *New Trial*; indorser of a note, given for an illegal consideration, who has suffered a judgment by default, should be relieved from the judgment, where the makers have been discharged on account of the illegal consideration.

204. After the holder of a note has fixed the liability of an accommodation indorser by judgment, the latter becomes a principal and is not entitled to the aid of a court of equity as a surety. *McNutt v. Wilcox*, Freem. Ch. 116.

205. See *Surety*, 30; an accommodation indorser where the principal has secured the debt by mortgage, may execute his individual note in payment of the debt, and take a transfer of it and the mortgage, and foreclose it.

206. See *Agent*, 16; when the assignee of agent of notes belonging to principal, will be decreed to hold the notes for the benefit of the principal.

207. Where the makers of a note induced the indorser to indorse it for their accommodation, by representing that it was to be used in renewal of a note on which the indorser was liable, and it appeared that the indorser was not so liable,

and that the maker used the note for a different purpose; *held*, that the indorser was not liable thereon unless the holder had obtained it without knowledge of the fraud on the indorser, in the usual course of trade, for value; and the holder of the note must show these facts. *Nevitt v. Bank of Port Gibson*, Freem. Ch. 438.

BILL OF PARTICULARS.

1. Where the declaration describes the cause of action with sufficient particularity to give the defendant notice of it, no bill of particulars is necessary; as where in assumpsit to recover the price of horses sold, the declaration described the horses particularly by color, it was *held*, no bill of particulars was necessary; but where the declaration is not thus specific, no evidence can be given of other items. *Nevitt v. Rabe*, 5 How. 653.

2. It seems if no objection be made to the evidence in the court below for want of a bill of particulars, it cannot be made in the high court. *Ib.*; *Bank of Louisiana v. Ballard*, 7 How. 371.

3. In an action of assumpsit against a bank founded on its notes, the notes offered in evidence did not correspond with the bill of items filed with the declaration, but were correctly described in the process forming the foundation of the suit, and had been on file in the papers of the case since the institution of the suit; *held*, that they were admissible in evidence notwithstanding they differed from those described in the bill of particulars. *Hughes v. Grand Gulf Bank*, 2 S. & M. 115.

BOARD OF POLICE.

1. Where a supposed creditor of a county presents his claim for allowance before the board of police, and it refuses his application, such refusal is a judgment of the board from which an appeal, under the statute, by bill of exceptions or *certiorari*, will lie to the circuit court; such appeal not being unconstitutional, there being an ultimate appeal to the high court. *County of Yalabusha v. Carbry*, 3 S. & M. 529.

2. An agreement made of record, before the board of police, that an appeal from their decision may be tried *de novo* upon such evidence as might be produced, is equivalent to an agreement for a trial by jury in the circuit court, and waives any objection that might otherwise lie to such mode of trial there; whether the appellant would, at all events, be entitled to a jury trial there. *Quære?* But where the county consents to it of record, he would be. *Ib.*

3. The judgment of the board of police, like that of any other competent tribunal, is final until reversed. *Ib.* So also *Ross v. Lane*, 3 S. & M. 695.

4. Where the statute allowed an appeal from the decisions of the board of police by bill of exceptions, and the board consented of record to an appeal without the bill; *held*, that the consent cured the error. *Ib.*

5. The board of police of each county has power under the statute to contract for the building of the court house; the commissioners empowered by law to contract for the work, being the mere agents of the board. *Ib.*

6. The right to a change of ve-

nue in civil cases, applies only to cases instituted in the circuit court, and not appeals from the board of police; and if, on such an appeal, the venue be changed, and a trial and verdict had in the new county, they will be void for want of jurisdiction. *Ib.*

7. Whether a suit can be brought directly against a county as a *quasi* corporation without express statutory provision seems doubtful. *Ib.*

BOND OF INDEMNITY.

A bond of indemnity given by one partner to another, conditioned to save him harmless from any loss or damage, growing out of the partnership debts, is not a bond to pay the debts, and a court of equity cannot entertain a bill by the obligee therein, to compel the obligor to pay them, where no damage has been suffered by the obligee; and it seems that, as a general rule, a court of equity will never decree the specific performance of a bond of indemnity sounding in damages, unless it covenant to do a particular thing by way of indemnity and a breach of the bond would be productive of injury irreparable at law. *Hoy v. Hansborough*, Freem. Ch. 533; *idem Foote v. Garland*, 1 S. & M. Ch. 95.

BONDS.

1. See *Pleading*, 9; as to declaration on bonds with conditions. *Mullen v. Jelks*, Walk. 205.

2. In an action founded on a bond with conditions, and no assignment of breaches, it is error to assess damages. *Riley v. Ruffin*, Walk. 425.

3. A plea of payment admits the

execution of the bond sued on. *Hines v. Rogers*, Walk. 486.

4. An erasure of the names of two out of three of the obligors to a bond for building a public bridge, vitiates the bond as to all those parties to it not assenting to the erasure. *Love v. Shoape*, Walk. 508.

5. An omission, in an action on a bond to set out the consideration or the use for which the bond was intended, or the liability of others, will not be ground of variance if the obligation is declared on according to its effect. *Berthe v. Biggs*, 1 How. 195.

6. An obligation signed by B. for the payment by him of money expressed to be loaned to the estate of E., is binding on B. as his personal obligation, and in the declaration on the bond, the estate of E. need not be mentioned.

7. See *Evidence*, 81, as to how far injunction bond void for ambiguity and uncertainty.

8. See *Pleading*, 34; as to action on bond with conditions.

9. See *Executors and Administrators*, 43; as to how far a suit may be brought on executor's bond for use of one who is at the same time administrator of one of the obligors in the bond.

10. See *Pleading*, 45; for plea of *non damnificatus* to action on bond of indemnity.

11. Giving a bond for a simple contract debt is a discharge of the latter *prima facie*, though it may be shown that it was only taken as collateral. *Myers v. Oglesby*, 6 How. 46.

12. If to an action on a penal bond with a condition, to recover damages for a breach of the condition, the defendant plead general performance, and the plea be replied to, and issue joined, the burden of proof is on the plaintiff, and he must establish his breach as aver-

red ; but the rule is otherwise if the defendant plead special performance. *Holiday v. Cooper*, 1 S. & M. 633 ; and a plea of general performance is bad. *Emanuel v. Laughlin*, 3 S. & M. 342.

13. The taking a bond for title implies either that the title is imperfect, and time is required to perfect it, or else that the vendor retains the title for his own security ; and where such a bond is given and it is clear the vendor never can make title, a court of chancery will relieve the vendee from the payment of the purchase-money. *Hall v. Thompson*, 1 S. & M. 443.

14. Under the statute of this state making bonds, &c. assignable, the indorsement of the obligee to pass the right to the assignee need not be under seal ; a mere parol indorsement will pass the right to

sue. *Montgomery v. Dillingham*, 3 S. & M. 647.

15. Payment of a bond may be shown by parol. *Tinnin v. Garrett*, 4 S. & M. 207.

16. See *Bail*, 2. A bail bond is no longer obligatory when the statute has taken from the bail the power to deliver up his principal ; a bond not being obligatory after the condition has become impossible or illegal.

17. See *Executor and Administrator*, 112. Joint suits may be prosecuted against surviving obligor and representative of deceased obligor.

BOND FOR TITLE.

See *infra*, *Real Estate and Vendor and Vendee*.

C.

CERTIORARI.

1. The want of original process, after appearance and plea, can only be taken advantage of, if at all, by writ of *certiorari*. *Delahuff v. Reed*, Walk. 74.

2. A *certiorari* is not a writ of right, to be granted as a matter of course, without any showing that the law has been violated or injustice done ; and though in England, in prosecutions at the instance of the king, it is the custom to issue writs of *certiorari* as a matter of course on behalf of the crown, yet in civil cases it should not be granted where an appeal is given, if the objection be not to the want of jurisdiction ; nor should it be granted

pending an appeal ; but whenever the rights of individuals are infringed by those in authority, who act illegally, they may have redress by *certiorari*, unless they can resort to a writ of error. *Duggen v. McGruder*, Walk. 112.

3. Even after the expiration of right of appeal, a *certiorari* may sometimes be granted where the rights of individuals are affected by the illegal acts of those in authority. *Ib.*

4. Probate judge has no right to issue writ of *certiorari*. *Barlow v. Esterling*, Walk. 302.

5. Where A. alleged, in a petition for a *certiorari*, that he had a judgment in the circuit court against B. for a certain sum, and that B.

had a judgment in the magistrates' court against A. for a smaller, which B. was seeking to enforce without paying A.'s judgment; *held*, that A. was not entitled to a *certiorari* against the judgment of B., and one improperly awarded should be dismissed. *Leech v. Irwing*, 2 How. 887.

6. The *petition* for a *certiorari* is addressed to the discretion of the circuit judge; if he grants it the high court cannot review it; it is the same also with the bond given on the petition. Neither the petition nor bond are parts of the record unless made so by bill of exceptions. *Loomis v. Bank of Columbus*, 4 How. 660.

7. It is too late, after the defendant in error has joined in the error assigned, to move for a *certiorari*; joinder in error is like a demurrer, it admits that the causes of error assigned exist in the record, but denies their sufficiency. *Patrick v. McKernon*, 5 How. 578.

8. On motion for a *certiorari* for a better record, satisfactory proof must be made that the defect alleged exists in the record, and that it can be amended. *Ib.*

9. A *certiorari* to take a case from a justice's court to the circuit court lies only where it is alleged the *judgment* in the justice's court is unjust, and not for any irregularities since judgment; it can only issue within a year from the date of the judgment under the statute. *Ewing v. Burton*, 5 How. 660.

10. The court can award a *certiorari* to bring up a better record, in criminal as well as civil cases. *Loper v. State*, 3 How. 429.

11. On the removal of a cause by *certiorari* from the justices' court, the defendant in the *certiorari* must have notice. *Copeland v. Pate*, 6 How. 275.

12. See *Circuit Court*, '10; for jurisdiction of cases brought up by *certiorari*; and power to dismiss the *certiorari* after appearance.

13. A *certiorari* will be allowed as well when an excess of matter in the record is suggested, as when a diminution; where, therefore, an imperfection in the record is alleged, in its containing matter not in the record below, a *certiorari* for a new record will be awarded. *Harris v. The Planters Bank*, 4 S. & M. 701.

CHAMPERTY.

1. Whether sale of the interest of one tenant in common after ouster by his co-tenant is void for champerty, *Quære?* *Harmon v. James*, 7 S. & M. 111.

2. There are no statutes on the subject of champerty in this state; the English statute of 32 Henry VIII. c. 9, on that subject, is not in force here; in order, therefore, to avoid a contract on the ground of champerty, the common law offence must be complete; to constitute which, it must not only be proved that there was adverse possession at the time of sale, but that the purchaser had knowledge of such adverse possession; this is especially the case where the land granted was in forest and wild at the time of the grant. *Sessions v. Reynolds*, 7 S. & M. 130.

CHANCERY.

- a. *Account.*
- b. *Amendment.*
- c. *Answer and Pro Confesso.*
- d. *Attachment in Chancery.*
- e. *Bill of Discovery.*
- f. *Bill of Interpleader.*
- g. *Bills quia timet.*

- h. *Bills of Review.*
- i. *Decree.*
- j. *Demurrer.*
- k. *Depositions.*
- l. *Dismissal, Effect of.*
- m. *Fraud.*
- nn. *Infants.*
- o. *Injunction.*
- p. *Issue out of Chancery.*
- q. *Jurisdiction; and herein of Fraud, Accident, Mistake, Rescission of Contracts, Cancellation of Deeds, and the general Principles of Jurisdiction.*
- r. *Marshalling Assets.*
- s. *Mortgage.*
- t. *New Trial; and herein of reasons for not making defence at law.*
- u. *Parties.*
- v. *Pleading.*
- w. *Practice in Chancery.*
- x. *Publication.*
- y. *Purchaser without Notice.*
- z. *Real Estate.*
- aa. *Receiver.*
- bb. *Rehearing.*
- cc. *Relief.*
- dd. *Revivor.*
- ee. *Rules of Court.*
- ff. *Sale by Commissioner of Chancery Court.*
- gg. *Specific Performance of Contracts.*
- hh. *Time, effect of, in Equity.*

a. *Account.*

1. Upon an interlocutory decree of a court of chancery, referring an account to three persons by name, as auditors, or a majority of them, it is no valid objection to the proceedings and report of the auditors, that one of the three was never notified to attend. Had the exception to the absence of one of the auditors been valid, it should have been taken before the auditors. *Davis v. Foley*, Walk. 43.

2. Exceptions to the auditors' report cannot be sustained unless they were made and overruled before the auditors and certified by them to the court; a party cannot, by exception to the auditor's report, impugn the decree directing the report

to be taken, nor rely upon new grounds of defence not set forth in the pleadings; in the absence of statute direction, the practice before auditors must conform strictly to the practice of the master in England. *Ib.*

3. G. obtained a judgment against H. & D., which was paid by M. at the instance of H. & D.; M. took an assignment of the judgment from the attorney at law of G. and attempted to enforce it by execution; H. & D. enjoined the execution on the ground of its payment by M., and in their bill prayed that a general account might be taken, which the chancellor ordered, and upon which it appeared that H. & D. and G. were each indebted to M., and the chancellor decreed payment; *held*, that as H. & D. had prayed the account in their bill for the injunction, although they need not have done so, yet they could not be allowed to object to it, nor the decree under it. *Head v. Gervais*, Walk. 431.

4. If in answer to a bill calling a trustee to account, he respond that the trust property has been exhausted in the purposes of the trust, no decree to account should be ordered against him. *Stamps v. Bracy*, 1 How. 312.

5. An account may be ordered even if it is not prayed for. *Gildart v. Starke*, 1 How. 450.

6. In exceptions to a report, the parties excepting are confined to the objections to the report which were taken before the commissioner, and by him disallowed. *Ib.*

7. The notice required of settling an account for report from the commissioner is reasonable only; nine days notice held to be reasonable. *Ib.*

8. An interlocutory decree to account need not be ordered where the parties have made and agreed

to a final settlement between themselves ; unless there is ground laid to surcharge and falsify the account. *Calvit v. Markham*, 3 How. 343.

9. In order to surcharge an account, the specific errors must be pointed out ; a general charge of error will not do. *Ib.*

10. If the record show that the counsel of both parties consented that a commissioner, appointed by the chancellor to take and state an account between the parties, should proceed to take the account, and there is no evidence that such consent was intended to give the commissioner authority also to proceed to settle his report without further notice to the parties, and he does proceed to settle his report without notice, and exceptions are filed to his report for the want of notice, the exceptions should be sustained and the cause recommitted to the commissioner. *Poindexter v. La-Roche*, 7 S. & M. 699.

11. Where a cause was referred to S. & F., or either of them, to state an account between the parties, and S. alone stated the account, and his report was excepted to, and the exceptions sustained and the cause recommitted to the commissioner, *held*, that S. was the commissioner to whom the recommitment was made, and report therefore made by F. upon the recommitment was subject to exception therefor. *Ib.*

12. In order to lay the foundation for an interlocutory decree to account, the facts in relation to the account must not only be put in issue, but there must be some evidence to show that the facts are probable and the equity proper ; the court will not make a reference unless the testimony in chief is first taken. *Planters Bank v. Stockman*, Freem. Ch. 502.

13. An interlocutory decree for an account is always under the control of the court, and may, under peculiar views, even after confirmation of the report by a commissioner taxing an account under the decree, be reviewed and set aside. *Davis v. Roberts*, 1 S. & M. Ch. 543.

14. D. filed her bill, claiming a large sum to be due from R.'s intestate, V. (for whom D. had once been guardian,) for sums expended for V. while she was her ward ; an interlocutory decree for an account, though the bill did not pray for an account, was rendered, and the commissioner reported a large balance to be due D. for the care of V., not only while the relation of guardian and ward existed, but for a period long anterior to that time ; which report, although excepted to by both parties, was confirmed without disposing of the exceptions ; *held*, upon final hearing of the cause that the report of the commissioner was not *res adjudicata* by the order of confirmation, but was under the control of the court, and should be set aside and annulled for irregularity. *Davis v. Roberts*, 1 S. & M. Ch. 543.

15. Where exceptions are allowed to a report reducing the amount of the account reported, the court can, without referring the accounts back for a restatement, modify the report and settle the true amount upon the evidence reported. *Ib.*

16. Where a case is referred to a commissioner to state an account between the parties, and one of the parties files exceptions to the report of the commissioner, and the chancellor refers the exceptions to a master commissioner, who overrules all the exceptions, and the report of the master commissioner is confirmed by the chancellor with-

out any exceptions taken thereto ; the party who filed the exceptions to the report of the first commissioner is not thereby concluded ; but he may avail himself of the benefit of those exceptions in the high court of errors and appeals. *Poin-dexter v. LaRoche*, 7 S. & M. 699.

b. *Amendment.*

17. Where the court is about to sign a final decree in chancery, it is too late to move to amend the answer. *Burnham v. Huffman*, Walk. 381.

18. It is too late, two years after answer filed and the cause set for hearing, to move to amend the bill to surcharge and falsify a settlement with the probate court, by inserting a charge of fraud in passing the account. *Vertner v. Griffith*, Walk. 414.

19. After the court has decided a demurrer to a bill, for want of equity on its face, it is too late to move to amend. *McComas v. Minor*, Walk. 513.

20. The court of chancery has power to allow amendments of the pleadings at any stage in the progress of the cause ; such amendments are in his discretion, and when made will not be inquired into by the high court. *Truly v. Lane*, 7 S. & M. 325.

21. A complainant making application to amend a sworn bill after the answer of the defendant is filed, must show that the proposed amendment contains matter important to his rights, and which was unknown to him at the time of filing his original bill, or else he must show a special reason which will excuse him from negligence in the matter. *Everett v. Winn*, 1 S. & M. Chf. 67.

c. *Answer and Pro Confesso.*

22. Where the facts stated in complainant's bill are denied in respondent's answer, they must be proved by two credible witnesses, or one witness and strong corroborating circumstances. *Lee v. Montgomery*, Walk. 109.

23. An answer responsive to the bill can only be rebutted by the testimony of two witnesses, or of one witness and strong corroborating circumstances ; but the rule is otherwise, as to matter in avoidance stated in an answer ; where, therefore, the defendant admitted the execution of the bond charged in the bill, but averred payment, that averment was no evidence of payment. *Nichols v. Daniels*, Walk. 224.

24. See *Evidence*, 46 : Answer in chancery when not evidence for the defendant in a suit at law.

25. Where a defendant admits the charges in the bill, but sets up matter in avoidance, if the bill be set down for hearing generally, without replication, the answer will not be taken as true to its fullest extent ; if it appear, however, that the plaintiff set the bill down for hearing, the answer will be received as true in all points. *Carmichael v. Watson*, 1 How. 333.

26. An evasive answer, neither admitting nor denying the allegations of the bill, is properly rejected ; and where leave is given to answer over, and it is declined, and an application to plead refused ; held, that the refusal to allow the defendant to plead was not erroneous, as it was in the discretion of the chancellor, and it did not appear what the defendant intended to plead. *Carmichael v. Hunter*, 4 How. 308.

27. If a cause be set for hearing

by the complainant on bill and answer, at the return term, as it may be under the statute of this state, the entire answer is to be taken as true; but if there be a continuance and depositions opened, as the rule of court dispenses with a replication to the answer, the cause will stand as on replication filed, and all matter in avoidance set up by the answer, which is not responsive to the bill, must be proved. *Russel v. Moffitt*, 6 How. 303. See also *infra*, *Chancery, Specific Performance*.

28. Although, as a general rule, the answer of one defendant is not evidence against his co-defendant, yet if the defendants are privies, (and they are so, where one claims as the assignee of the other,) the answer of the assignor will be evidence against the assignee. *Fitch v. Stamps*, 6 How. 487.

29. Where an answer and a demurrer are both filed to a bill of discovery, the former overrules the latter. *Robinson v. Francis*, 7 How. 458. The rule is general. *Baines v. McGee*, 1 S. & M. 208.

30. It is too late on appeal from the decision of the chancery court, dissolving an injunction, to object that the answer was not filed within the time prescribed, after overruling the demurrer; the objection should be made in the court below, before the answer was filed; it is also too late on appeal to object to the *jurat* to an answer; if the objection is not made in the court below, it will be considered as being waived. *Yeizer v. Burke*, 3 S. & M. 439.

31. As a general rule, the answer of one defendant is not evidence against his co-defendant; nor does the failure of one to an-

swer and *pro confesso* against him, entitle the complainant to take the allegations of the bill against him as true, so as to defeat the rights of one who does answer; where, therefore, the bill charged fraud in the vendor of land, and sought a rescission of the contract and an injunction against the collection of the purchase-money, by the assignee of the vendor, and the bill was taken for confessed against the vendor, but the assignee answered, denying all knowledge of the fraud, and claiming to be a *bona fide* assignee for value without notice; it was *held*, that the *pro confesso*, as to the vendor, did not make the allegations of the bill true as to the assignee, and in default of their proof *aliunde*, the bill must be dismissed. *Holloway v. Moore*, 4 S. & M. 594.

32. Taking a case for confessed in equity, entitles the complainant to a decree only against the party as to whom the bill has been taken for confessed; not against the others; and if the defendant against whom no *pro confesso* has been taken, disprove the bill, the whole will be dismissed. *Hargrove v. Martin*, 6 S. & M. 61.

33. Where a decree has been rendered in a suit against adults and infants, on *pro confesso* against the former, without proof, and the high court on that account reverse the decree, the *pro confesso* as to the adults will not thereby be set aside; the cause will proceed as if no decree had been pronounced. *Ib.*

34. Where an answer sets up matter in avoidance of the equitable allegations in the bill which it admits, such matter is not evidence to the court on a motion to dissolve the injunction on bill and answer.

Ferriday v. Selcer, Freem. Ch. R. 258.

35. The answers to a bill to interrogatories propounded in it are evidence for as well as against the defendant; but if the answer do not respond to all the allegations of the bill, and is not excepted to, the burden of proving the allegations of the bill will still rest on the complainant. *Oakey v. Rabb*, Freem. Ch. R. 546.

36. Where the original notes, given by the mortgagor of a tract of land, for the purchase-money, are taken up and new ones substituted instead by the vendee, and the vendor files his bill to enforce his equitable lien, the answer of the vendee that the new notes *were received in satisfaction and discharge of that lien*, is not evidence. *Planters Bank v. Courtney*, 1 S. & M. Ch. 40.

37. A mere motion in court to dissolve an injunction granted in a case is not that formal entry of appearance which will authorize the complainant to take a *pro confesso* against the party making the motion; to justify the complainant's taking his bill for confessed, process must either have been served upon the other party, or his *appearance* as a defendant to the cause formally entered of record; and there being no regular appearance days fixed by the rules of the court, a party desirous to enter his appearance can do so at any time while the court is in session, by making his application, and having it entered of record. *Chewing v. Nichols*, 1 S. & M. Ch. 122.

38. A bill may be taken for confessed, even though the exhibits to the bill are not filed. *Gwin v. Stone*, 1 S. & M. Ch. 124.

39. Applications to set aside *pro confessos* are addressed to the discretion of the court upon the circumstances of each particular case; and will, as a general rule, be granted, if not productive of injurious delay, and the applicant has not been culpably negligent; where, therefore, G. filed his bill against H. a non-resident, and upon proof of publication of notice, took this bill for confessed; H. applied for leave to answer, stating that he knew of the pendency of the bill, but his counsel informed him no answer would be needed; as soon as he learned a *pro confesso* had been entered against him he came to the state to have it set aside; the cause was not in a condition for final hearing, for want of further evidence on the part of the complainant; *held*, that the *pro confesso* should be set aside, and the answer filed, on the payment of all costs by the defendant. *Gwin v. Harris*, 1 S. & M. Ch. 528.

d. Attachment in Chancery.

40. See *Attachments in Chancery*, 1 and 2. The court of chancery has jurisdiction of a bill filed by a non-resident complainant against a non-resident debtor, if there be also a resident defendant; whether there be a judgment at law or not. *Comstock v. Rayford*, 1 S. & M. 423; so, also, whether there be a home defendant or not, even though all the parties are non-residents, if the defendant hath lands, &c. within the state, which the bill seeks to attach. *Zecharie v. Bowers*, 3 S. & M. 641.

41. W. B. dies intestate, S. B. administers upon his estate, and leaves the country with the property of W. B. in possession; *held*, that the court of chancery had ju-

risdiction of a suit, by the distributees of W. B., to attach the property of S. B. left in this state, and subject it to the payment of his liability to the estate of W. B., that being clearly ascertained by the pleadings and proof, and it appearing that the ancestor's debts were all paid, and no administration then pending upon the estate. If the debts were unpaid, or administration *de bonis non* existing in either case, the bill would have to be filed by the administrator *de bonis non*, to subject the property for the benefit of the creditors, or ascertain the amount of the indebtedness of the first administrator. *Barrow v. Barrow*, 1 S. & M. Ch. 101.

42. The lien of an attachment in chancery, commences and takes effect from the time of the *levy*, and not from the time of *issuing* the attachment. *Mears v. Winslow*, 1 S. & M. Ch. 449.

e. *Bill of Discovery.*

43. A bill for mere discovery cannot be set down for final hearing. *Townsend v. Odam*, Walk. 356.

44. Where matters in avoidance are stated in an answer to a bill of discovery they are subject to be supported or disproved by evidence *abunde*, on both sides. *Greenleaf v. Highland*, Walk. 375.

45. A bill of discovery cannot be used by the party answering, unless the answer be first introduced by the other party. *Ib.*

46. The defendant to a bill of discovery is bound to answer a bill charging that the defendant was seeking to enforce an usurious contract; even though his answer may cause him to forfeit the legal interest. *Taylor v. Matchell*, 1 How. 596.

47. The material charges in a bill of discovery, which are neither admitted nor denied, are to be taken as true. *Ib.*

48. It is not a valid objection to an answer to a bill of discovery to be read in a trial at law, that it contains a mere statement of the substance of a correspondence called for, if the correspondence itself be made a part of the answer. *Fox v. Fisk*, 6 How. 328.

49. The filing a bill of discovery is an admission that the complainant therein cannot prove the facts, except by the answer of his adversary; and that answer is conclusive, it cannot be contradicted. *Robinson v. Francis*, 7 How. 458.

50. Where an answer and demurrer are both filed to a bill of discovery, the former overrules the latter. *Ib.*

51. The allowance of a bill of discovery, in a trial at law, is, under the statute of 1828, a matter in the sound discretion of the court, and ought not to be granted where it is not applied for until the cause is called for trial. *Dillahunty v. Smith*, 7 How. 673.

52. A bill of discovery, under the statutes, in a suit at law, when applied for on proper grounds, must be granted, it is not a matter in the discretion of the court below which cannot be reviewed by the high court; where, therefore, before a case was called for trial, the defendant offered a bill of discovery on proper grounds, it was *held*, by the high court to be error in the court below, not to compel an answer to it. *Scott v. Hamblin*, 3 S. & M. 285.

53. The allowance of a bill of discovery, under the statute, in a trial at law, being in the discretion of the court, is properly refused

where it is not offered, and a continuance prayed to procure an answer, until the case is called for trial.

Rule v. Taylor, 4 S. & M. 577.

See *supra*, *Bill of Discovery*, *passim*.

f. *Bill of Interpleader*.

54. A bill of interpleader is a proper remedy where suits are either threatened or actually pending by two different claimants against a party, claiming the same debt or duty by different or separate interests; but after the right is determined by a judgment at law against the interpleader he cannot interplead; as where two judgments were rendered against a garnishee, one in favor of the attaching creditor and the other in favor of the assignee of the note, the note being in fact the foundation of both judgments, and the garnishee having defended both cases, he cannot, in a court of equity by a bill of interpleader, obtain a perpetual injunction against either. *Yarborough v. Thompson*, 3 S. & M. 291.

55. A bill of interpleader admits the indebtedness of the complainant therein, and when one of the two parties defendant withdraws all claim to the fund, a decree in favor of the other is a matter of course. *Knight v. Yarborough*, 7 S. & M. 179.

56. C. being the administrator of a deceased mortgagor, was garnisheed by B., a creditor of the mortgagee, and answered admitting the debt, and judgment was rendered against him; C. afterwards found that the mortgagee had previously transferred the mortgage notes to G., who insisted on their payment to him; C. filed his bill, making them all parties, and requiring them to interplead and set-

tle their conflicting rights to the mortgage debt, and praying an injunction against the judgment of B.; held, that the case presented by the bill was a proper one of interpleader, and that the judgment of B. should be enjoined until it was ascertained whether the transfer of the notes was before or after the judgment; and if before, that the judgment of B. should be perpetually enjoined. *Cannon v. Kinney*, 1 S. & M. Ch. 555. See *infra*, tit. *Garnishment*; for interpleader in case of. *Cocke v. Ledbetter*, 1 How. 43.

g. *Bills quia timet*.

57. In a bill *quia timet* it is necessary to allege and prove that the complainant will be damnified by the act, to prevent which the injunction is prayed. *Green v. Hankinson*, Walk. 487.

h. *Bills of Review*.

58. A bill of review will not be granted merely to accumulate testimony on a point already in issue in the former case and decided; therefore, where the question at issue was one of heirship, and it was decided against the claimant, he cannot have a bill of review because he has discovered new witnesses to establish his heirship; if, however, such a bill of review be permitted to be filed without objection, and be answered and proof taken, the objection cannot prevail in the appellate court. *Iler v. Routh*, 3 How. 276.

59. A bill of review can only be entertained for errors of law appearing in the body of the decree, or for new and material matter discovered after enrolment of the decree; where, therefore, on a bill in equity to foreclose a mort-

gage, a decree was ordered directing an execution of *fi. fa.* to issue for any balance unsatisfied by the sale, a bill to review the decree will lie. *Stark v. Mercer*, 3 How. 377.

60. A bill of review will not lie because the complainant has not procured the record of a suit, the existence of which, he knew of, at the time of the pendency of the original bill; he should have applied for a continuance, or rehearing if he could not procure it then. *Speight v. Adams*, Free. Ch. 318.

61. A court of mere errors and appeals cannot take original cognizance of a bill of review; it can only be filed in the court in which the original decree sought to be reviewed was made. *Mercer v. Starke*, 1 S. & M. Ch. 479.

62. If a bill of review is sustained in a case which, when decided, was ready for final hearing, but in which the court erred in rendering the decree merely, the whole case is not thereby reopened, but the court will only correct the error in the decree so as to make it conform to the law, but if the bill of review is sustained because the case, when submitted, was not in a proper attitude for final hearing, then the whole case is open for re-examination. *Ib.*

i. Decree.

63. An action cannot be maintained on a final decree in chancery, rendered after the death of the defendant, though founded upon an interlocutory order made during his life. *Gerault v. Anderson*, Walk. 30; *Neilson v. Holmes*, *Ib.* 261.

64. See *Judgment*, 123; a decree in chancery inadmissible as evidence, without the previous proceedings.

65. A final decree in chancery, made after defendant's death, though based on interlocutory order in his life-time, is void. *Gerault v. Anderson*, Walk. 30; and may be reversed on a bill of review, or by writ of error *coram nobis*. *Neilson v. Holmes*, *Ib.* 261.

66. See *Jurisdiction*, 8; as to appeal from interlocutory decree.

67. A decree without *pro confesso* against a material party who has not answered, is irregular. *Carman v. Watson*, 1 How. 333.

68. Where a bill is taken for confessed against one defendant and it appears from the bill and answers of other defendants that the complainant had no right to a decree against the defendant who did not answer, the court will not make one. *Minor v. Stewart*, 2 How. 912; *Russell v. Moffit*, 6 How. 303. Decrees in chancery may be revived by *scire facias*. *McCoy v. Nichols*; 4 How. 31.

69. A final decree in chancery is one which makes an end of the case, and decides the whole matter in controversy, costs and all, leaving nothing further for the court to do; interlocutory decrees are decrees made in the progress of the cause and are open to re-examination on a petition for that purpose; therefore in a suit against an administrator by the heirs and distributees of the intestate, to set aside sales made by the administrator, at which he became the purchaser and for an account, a decree setting the sales aside, appointing a receiver, ordering an account and directing an issue to the country, and reserving the question of costs and all other questions, until the coming in of the report and the return of the verdict, is an interlocutory decree,

may be opened on petition, the issue to the country withdrawn, and the chancellor may decide the questions involved, and give a final decree, without reference to the previous interlocutory decree. *Cook v. Bay*, 4 How. 485.

70. A decree in equity subjecting certain property to the satisfaction of a judgment at law, and ordering a sale of it for that purpose, must state the precise amount for which the premises are to be held liable; which must be ascertained by the court, before decreeing the sale, otherwise the decree will be erroneous. *Cohen v. Carroll*, 5 S. & M. 545.

71. Where a decree of sale of property is made, it is generally left to counsel to designate the length of time and mode of publication of notice of the sale; the court taking care that the notice is reasonable and fair. *Guise v. Middleton*, 1 S. & M. Ch. 89.

72. A decree cannot be amended after it is enrolled, in a matter of materiality, unless the record exhibits something to amend by; a mere clerical mistake; or miscalculation may be amended at any time, where the mistake is apparent on the face of the decree or record; but where a decree by mistake, required certain property to be advertised for *six months* for sale, when it was intended to be advertised for only *six weeks*, and the decree had been enrolled, the court refused to amend it. *Ib.*

73. Where a suit in chancery was brought against several parties, and the complainant submitted the case for decree against two upon their answers, and stated, in a paper filed in the case, that he sought no decree against the others who had not been served with process,

and a decree was rendered against the two who had answered and consented to the decree, taking no notice of the others; *held*, that as to the two who had answered and assented to the decree, a failure to dismiss formally as to the others could not be taken advantage of; and that the written statement that no decree was sought against them was equivalent to a dismissal. *Pipkin v. Haun*, Freem. Ch. 254.

74. Whether a motion to vacate a decree, a year after it has been enrolled, can be entertained, even though the decree were fatally defective, *Quære?* *Ib.*

75. A decree which orders the payment of money, will not be set aside on the ground that the defendant therein had been enjoined, in a previous suit at the instance of a third party, from paying the money over, where the defendant in his answer makes no mention of such injunction. *Ib.*

j. Demurrer.

76. An appeal may be taken from chancery upon a decision on demurrer, and the defendants are not bound to answer before a decision on the appeal. *Montgomery v. Norris*, 1 How. 499.

77. Where a demurrer is improperly overruled and the defendants answer, the propriety of overruling the demurrer will be open for investigation. *McNeil v. Burton*, 1 How. 510.

k. Depositions.

78. Depositions taken to be read on behalf of defendants to the original bill, upon notice given by counsel, not representing any of the defendants to that bill, are irregularly taken, and will be sup-

pressed. *Payne v. Cowan*, 1 S. & M. Ch. 26.

79. It is a sufficient ground to suppress a deposition that the witness testifying is a defendant to the original bill, and no order of court had been given authorizing his deposition to be taken. *Ib.*

80. A deposition will be suppressed only for irregularity in the taking it; if the objection relates to the competency of the witness, it can only be made at the final hearing. *Gordon v. Watkins*, 1 S. & M. Ch. 37.

81. A commission is not necessary, under the present practice of the superior court of chancery, to take depositions; they can be taken on notice; justices of the peace are authorized to take them. *Ib.*

82. The evidence of service of a notice to take depositions must be by the return of the sheriff or affidavit of the party serving the notice. *Ib.*

1. Dismissal, effect of.

83. A dismissal of a bill in chancery for want of prosecution is not a bar to a future suit for the same cause. *Nevill v. Matthews*, Walk. 377.

m. Fraud.

See *infra*, Chancery, tit. *Jurisdiction*; also *Fraud and Fraudulent Conveyances*, *passim*.

84. A. agreed in writing to pay certain expressed debts of B. as set forth in a schedule, and received property of B. therefor; B. fraudulently inserted in the schedule other debts not agreed to be paid by A., and in reading the schedule over to A. omitted to read such inserted debts; the surety in one of the fraudulently inserted debts having paid it, filed a bill to charge

A. as trustee of B. with the debt thus paid; *held*, that A. was not liable, nor the property in his hands, to pay such fraudulently inserted debts. *Stamps v. Bracy*, 1 How. 312.

85. D. sold M. a tract of land and negroes, and represented at the time that the title was good; to eighteen of the slaves thus sold D. had no title, they being settled by deed upon his wife and children; M. on ascertaining this fact filed his bill in chancery for a rescission of the contract, charging the fraudulent suppression by D. of the absence of title in him to the eighteen slaves, and his fraudulent representation of good title; D. answered and denied fraud generally, but admitted his failure to inform M. of the deed to his wife and children, and said he had always thought the deed did not affect the title, and he had forgotten it at the time; and at the same time D. filed with his answer a bill of sale from his wife and children in whom the title was, to M. to the slaves, thus perfecting the title in M.; *held*, that D.'s conduct in suppressing the want of title to the eighteen slaves and representing his title good was fraudulent as to M., and entitled him to a rescission of the contract; but that as D. had perfected the title to the slaves, and M. had suffered no actual injury by the fraud practised upon him, the fraud would be cured by the perfection of the title, and M. could not have a rescission of the contract. *Davidson v. Moss*, 5 How. 673; the same doctrine, that fraud without damage does not vitiate a contract, is *held* in *Moss v. Davidson*, 1 S. & M. 112; *Hall v. Thompson*, 1 S. & M. 443.

86. See *Fraud*, 10; how far representations known by vendor

and vendee to be untrue as to the prospects and character of town lots sold, will be fraudulent as to vendee.

87. If a bill contain an allegation of fraud, it is a general rule that such allegation must be answered, and a general demurrer cannot be allowed. - *Stovall v. The Northern Bank*, 5 S. & M. 17.

88. Where fraud is charged generally in a bill and the answer denies it and the case is submitted without proof, the court will decree as if no fraud had been charged. *Stubblefield v. McRaven*, 5 S. & M. 130.

89. Fraud vacates all contracts, and whenever it is charged must be answered; yet if the fraud be charged in a case which will not justify the rescission of the contract, or in a case in which the court cannot give relief, it need not be answered. *Walker v. Gilbert*, 7 S. & M. 456.

90. It is well established that if a party has a knowledge that he has been defrauded, and yet subsequently confirms the original contract by making new agreements and engagements respecting it, he thereby waives the fraud, and abandons his claim to equitable relief. *Edwards v. Roberts*, 7 S. & M. 544; to same effect, *Pintard v. Martin*, 1 S. & M. Ch. 126.

91. E. purchased of R. certain lands, and took a bond for title, and becoming apprehensive that R. would not be able to make a good title to all of the land embraced in the purchase, he instituted suit on the bond; pending the suit it was agreed by the parties to submit to arbitration the amount to be allowed E. in the premises; the arbitrators not being able to agree, E. & R. determine to di-

vide the difference that existed between the arbitrators, and an award was made accordingly, which was recorded as part of the proceeding in the action on the title bond, and entered as the judgment of the court; and E. gave to R. a new note in accordance with the terms of the award; held, that whatever might have been E.'s equitable right to relief, on account of fraud practised upon him in the sale of the land, by consenting to abide the result of an arbitration upon the matters in dispute and giving a new note in accordance with the terms of the award, he virtually re-affirmed the contract and relinquished any right to relief he might have previously possessed. *Ib. Edwards v. Roberts*, 7 S. & M. 544.

92. Where a vendee comes to the knowledge of a fraud practised upon him in the sale of property; and afterwards continues for a series of years in the use, enjoyment and occupation thereof, without taking any active measures for redress, or making known any dissatisfaction; until a change of times may have depreciated its value, he can have no relief in equity. *Pintard v. Martin*, 1 S. & M. Ch. 126.

n. Infants.

93. See *Infants*, 3. No decree can be rendered against infants without proof; and reservation of a day, to show cause, &c., does not cure the error; such reservation extends only to defects in the decree.

94. An infant who is made a party defendant to a bill, for a specific performance of a contract by his ancestor, will be entitled under a general answer to avail himself of the statute of frauds; the rights of infants cannot be preju-

diced by any omission of their guardian *ad litem*. *Hood v. Bowman*, Freem. Ch. 290.

See *infra*, *Infancy*.

o. *Injunction*.

95. An injunction, requested apparently upon principles of justice and equity, should be granted in the first instance. *Lee v. Montgomery*, Walk. 109.

96. See *Executor and Administrator*, 5, as to right to injunction to restrain escheater general from collecting effects of alien deceased.

97. See *Waste*, 1. When injunction will and will not lie to stay waste.

98. See *Injunction*, 1 ; as to duty of clerk, in issuing injunction, to indorse on it, "its efficacy suspended until bond is given."

99. A plaintiff to a bill for injunction to stay waste, who admits the possession of the land by the defendant claiming and holding adversely, is not entitled to the injunction ; nor should an injunction to stay waste be granted even against a trespasser, unless upon unquestionable evidence of title, and where the threatened trespass would be irreparable. *Nevitt v. Gillespie*, 1 How. 108.

100. To grant continuance and dissolution of injunctions is in the discretion of the court ; they may be dissolved before answer or after, or after demurrer. *Jones v. Commercial Bank of Columbus*, 5 How. 43.

101. Where a defendant at law transfers his case to a court of equity upon an allegation, that his defence is equitable, the plaintiff at law should always be allowed to proceed to judgment in order that he may have execution thereof without delay, if the defence to his

action is not sustained in equity. *Anderson v. Walton*, Freem. Ch. 347.

102. The answer of one not a party to the suit, or of one who swears to his "information and belief" where the facts are not charged to be within his knowledge, and who does not set out his means of knowing, will not entitle him to the dissolution of an injunction granted on positive allegation in the bill. *McGuffie v. The Planters Bank*, Freem. Ch. 383.

103. A release of errors to a judgment at law is only required where the *defendant* therein seeks relief in chancery, not where a third party is applying for an injunction against the execution on the judgment being levied on his property ; a formal release of errors, it seems, is not requisite ; the emanation of the injunction itself, it seems, will be *ipso facto* a release of errors. *Sevier v. Ross*, Freem. Ch. 519.

104. The neglect of the complainants to have process served is just ground for dissolving an injunction in the case ; the rule is based on the ground of negligence, and will not apply where process has been regularly sued out but irregularly served, and the plaintiff has taken out new process as soon as the irregularity is detected. *Payne v. Cowan*, 1 S. & M. Ch. 26.

105. A party having a valid defence to a portion of the amount of a judgment at law, cannot have an injunction for the whole amount of the judgment. *Commis'srs Sinking Fund v. Patrick*, 1 S. & M. Ch. 110.

See *infra*, *Injunction and Injunction Bond*.

p. *Issue out of Chancery*.

106. It is in the discretion of the

chancellor to award an issue to the country or decide upon the facts himself; if he award an issue, however greatly the preponderance of facts in the case, it will be no ground of error. *Iler v. Routh*, 3 How. 276.

107. The chancellor may withdraw an issue to the country without waiting its decision, and may decide the case himself. *Cook v. Bay*, 4 How. 485.

108. A court of chancery has power to award an issue to ascertain the fact of the loss of a note sued for. *Truly v. Lane*, 7 S. & M. 325.

109. Exceptions to the opinion of the chancellor on the trial of an issue before him, excluding or admitting testimony, must be taken at the time and entered upon the minutes. *McIntyre v. Ledyard*, 1 S. & M. Ch. 91.

110. Oral evidence will not in any case be admitted on the trial of an issue in the chancery court; not even to prove the incompetency, show the interest, or attack the credibility of the witness. *Ib.*

q. *Jurisdiction; and herein of Fraud, Accident, Mistake, Rescission of Contracts, Cancellation of Deeds, and the general principles of Jurisdiction.*

111. If the equity of complainant and defendant be equal, the courts of chancery will not interfere. *Lee v. Montgomery*, Walk. 109.

112. See *Evidence*, 183, 184. When relief will be granted in equity for failure of consideration to note given for land; and how far parol evidence admissible to show mistake in the quantity of land called for by the deed.

113. Where the quantity of

acres warranted in a deed is not to be had, if the failure be total, it can be taken advantage of at law; if partial, only in equity. *Kerr v. Calvit*, Walk. 115.

114. See *Bill of Exchange and Promissory Note*, 7; for jurisdiction of equity as to relief of surety on note where he is injured by failure to sue the principal.

115. A resident in Louisiana having great domestic dissensions with his wife, whereby his mind is perturbed, and being naturally of weak intellects, and supposing that his wife has rights in his property which she has not, is induced by B., in order to get rid of these supposed rights of his wife, to make a sham conveyance for nominal, but no real consideration, of the property to B. by absolute deed, and to put B. in possession; held, that a court of equity, under the circumstances, would, at the instance of A., and on his bill, set his deed to B. aside, and decree B. to be a trustee of A. of the profits and increase of the property since the sham sale to B. *Dismukes v. Terry*, Walk. 197.

116. A trust may be established by parol in favor of one party against his absolute deed and the denial of the other; and though a *particeps criminis* in fraud, cannot succeed against the other party, yet a deed made to bar supposed rights of a wife, will be set aside at the instance of the grantor, if the grantee attempt to pervert it to fraudulent purposes. *Ib.*

117. When the defendant in chancery, to a bill to enjoin judgment at law, answers to the merits, it is too late at the hearing to object that the defence was at law. *McCauley v. Mardis*, Walk. 307.

118. A court of chancery has jurisdiction, even after judgment at

law thereon, to declare a note given for a gaming consideration, void under revised code, 326, § 22. *Ib.*

119. After judgment at law a court of chancery will grant no relief, unless upon grounds not available at law, or unless the party was prevented by fraud or accident or act of the other party without fault of his own, from making defence at law. *Miller v. Doxey*, Walk. 329.

120. A party cannot sue in equity for negroes, the possession of whom he claims a right to, by deed of gift, his remedy is at law; and where he has filed his bill, claiming his slaves under an instrument as a deed of gift, he cannot afterwards, on the trial, insist that the deed is a will. *Bates v. Bates*, Walk. 356.

121. On a bill filed to enjoin a judgment at law, the complainant cannot set up any matter of which he might have availed himself at law. *Montgomery v. Griffin*, Walk. 453.

122. It is not a sufficient averment, to set aside a voluntary deed as fraudulent, that "the grantor was indebted for transactions before and since the transfer, and that without the property transferred there will not be enough to pay his debts." *Miles v. Richards*, Walk. 477.

123. The chancery courts of this state will not entertain an inquiry into a charge of fraud against a patentee of the United States government, at the instance of a volunteer, and not directed by the government. *Ross v. Barlund*, Walk. 489.

124. Where the remedy is purely legal a court of equity, even after answer, will not entertain jurisdiction. *Binney v. Turner*, Walk. 498.

125. Courts of equity do not in-

terpose where purely legal questions are involved, except where the remedy at law is not clear, certain or adequate; or to prevent a multiplicity of actions where the subject-matter of the contest is held by one individual, and to which there are many claimants from a common source and with distinct interests; or with a view to prevent ruinous litigation where the party has satisfactorily established his right at law. *Nevitt v. Gillespie*, 1 How. 108.

126. Where there are only two claimants to land, a court of equity will not entertain a bill of peace until the right of one is fully established at law. *Ib.*

127. A defendant in trespass who, having a legal defence, has suffered judgment to go by default against him, can have no relief in equity against such judgment. *Ib.*

128. The court of chancery has jurisdiction of a bill filed by an executor, whose letters testamentary have been revoked, against the heirs of his testator, to make the property of their ancestor liable for debts due by the ancestor to the executor, and not retained by him; and also for sums of money legally disbursed by him in the payment of debts of the testator of a kind that he was, under the statute, authorized to pay. *Gildart v. Starke*, 1 How. 450.

129. Where an executor whose letters have been revoked, is seeking to make his testator's estate liable for debts paid and money advanced by him, his only remedy is in equity; but he must show that the debts he paid were such as he was authorized to pay under the law, and that the money he advanced was in the legitimate discharge of his executorial duties;

and if he be allowed his account without such proof it will be erroneous. *Ib.*

130. It is too late after answer, at the hearing on the merits, to object to the jurisdiction of the court, unless, perhaps in a case purely legal. *Cable v. Martin*, 1 How. 558.

131. Where the remedy is more complete in a court of chancery than at law, the former will take jurisdiction; as where the distributees of an estate are seeking to recover the property of their ancestor, and also the profits of it from the former administrator and other persons in possession of the property, claiming under him; even though they might have a remedy at law, they will be entitled also to relief in equity; especially if the property sought by the distributees was owned in part by the administrator in his own right, the interposition of a court of equity will be essential to settle the matters of account between the parties. *Ib.*; also, *McRea v. Walker*, 4 How. 455. It seems it would be otherwise, if the administrator were the only party. *Baines v. McGee*, 1 S. & M. 208.

132. See *Covenant*, 1, 2; for jurisdiction of chancery to enforce credits when an action is brought on a covenant sounding in damages; and also to establish the discharge of a covenant by a subsequent parol contract.

133. Courts of equity will correct mistakes in a written instrument in order to carry clearly into effect the intention of the parties, but the proof should be clear beyond a doubt; the court therefore refused to decree that a paper, which on its face was a testamentary disposition of property, and which the maker read over carefully, and un-

derstood fully when it was made, was a deed of gift; though the maker called the paper a deed and spoke of it as though it were irrevocable by her; yet also spoke of persons, who were the beneficiaries in it, as her intended *heirs*; and said she designed them to heir her property; and afterwards changed her mind, regretted she could not dispose of her property otherwise than by the instrument she had made; and finally made another will devising the property in another mode than that contained in the previous writing. *Harrington v. Harrington*, 2 How. 701.

134. Where a father, by instrument not under seal, conveyed certain negroes to his children and delivered a portion to them, but specified that he was to retain the residue during his own life; the delivery will pass to the children the title to those delivered, but the instrument will be inoperative as to those retained, and will be decreed to be cancelled on the application of the father. *Thompson v. Thompson*, 2 How. 737.

135. See *Will*, 10; for jurisdiction of chancery, over.

136. See *Executors and Administrators*, 35; *infra*, 141; and *Probate Court*, 8, for limit of jurisdiction in matters testamentary.

137. The act of the legislature, giving to the court of chancery jurisdiction of causes where the state is a party, does not enlarge the jurisdiction of the chancery court; but confines it to cases of equity cognizance only, in which the state is a party; that court will have no jurisdiction, therefore, of a bill against the state to recover damages for a breach of contract. *Farish v. The State*, 2 How. 826, *Sed aliter*; the court of chancery

has full jurisdiction where the state is a party, whether the claim be legal or equitable in its nature. *Farish v. The State*, 4 How. 170.

138. Where a judgment has been rendered in a court of law, in an action of trover for property claimed under a marriage contract, and in the suit at law the contract has received a construction; a court of equity will not take jurisdiction of a suit between the same parties about the same property, claimed under the same marriage articles. *Hooke v. Wood*, 2 How. 867.

139. A court of equity will correct a mistake in the description of lands in a deed. *Leonard v. Austin*, 2 How. 888.

140. Where a bill was filed by an administrator of A., praying that a decree might be opened by which property claimed by A., as one of the distributees and heirs of B., had been adjudged to C., and a demurrer to that bill overruled; and the complainant therein afterwards filed an amended bill and made the heirs at law of A. joint complainants in it with him, and the chancellor sustained a demurrer to the whole bill thus amended; *held*, to be properly done. *Scott v. Calvit*, 3 How. 148.

141. As a general rule the chancery court in this state has no jurisdiction over the matters confided by the constitution to the probate court; but if the probate court be incompetent to give relief, and the remedy be not lost by *laches*, a court of equity will entertain jurisdiction; but in almost every case touching the subject of its jurisdiction the probate court has ample power of relief. *Carmichael v. Browder*, 3 How. 252. The court of chancery has jurisdiction

where there is no administrator; as, where the widow has taken possession of the property without administering, the heirs and devisees may sue her in equity for account and other relief. *Farve v. Graves*, 4 S. & M. 707.

142. Where a bill was filed against C., by the heirs at law of H., some of whom were infants, alleging that he had taken possession of their land and used it for years, and seeking an account of rents and profits; *held*, that the chancery court had jurisdiction on account of the infancy of a portion of the complainants. *Carmichael v. Hunter*, 4 How. 308.

143. Where there has been no fraud on the part of the vendor of land, the vendee cannot come into equity to get a rescission of his contract, he must look to his covenants of warranty; but if there has been fraud, equity will grant relief even after judgment at law for the purchase-money; and any misrepresentation of the vendor or concealment in relation to the title to the land, by which the vendee is deceived to his injury, whether intentional or not on the part of the vendor, will be fraudulent; where, therefore, A. knowing his title to 570 acres of the land to be defective, represented to B. that the title was good, and sold B. 630 acres, including the defective part, and also sold him certain slaves and farming utensils with the land by an entire contract, and B. executed his notes in instalments for the purchase-money, upon which judgments at law were rendered in favor of the assignee of A. against B.; *held*, that B. would be entitled to relief against the fraudulent representations of A., though he had not

been evicted, and though the outstanding title was on the record; and that B. would be entitled to a rescission of the contract, which being entire, on the failure of a material part, must be all rescinded. *Parham v. Randolph*, 4 How. 435.

144. A court of chancery will entertain jurisdiction to decree that family servants be specifically delivered up, even though detinue or trover might be maintained at law. *McRea v. Walker*, 4 How. 455.

145. See *Slaves*, 19; how far court of equity will grant relief, after judgment at law on void contract. It will not do so, in any case where the defence existed and might have been made at law and was not so made; even though the contract on which the judgment was founded were absolutely void as against public policy and a positive prohibition in the constitution; in cases of concurrent jurisdiction the court first taking it, will decide finally. *Green v. Robinson*, 5 How. 80; *Glidewell v. Hite*, 5 How. 110; *Thomas v. Phillips*, 4 S. & M. 358.

146. It is no ground for vacating a sheriff's sale that the property sold low, under a mistaken belief that it was bound by a prior mortgage lien, and that the true condition of the title was known to the purchaser, where a reasonable inquiry could have corrected the mistake in relation to the incumbrance. *Drake v. Collins*, 5 How. 253.

147. A purchaser of land who is in possession, cannot have relief in equity against his contract to pay, on the mere ground of defect in title, without a previous eviction; unless the vendor has been guilty of fraud in suppressing the defects; but if the vendee had full notice

of the defect, he can have no relief in equity. *Anderson v. Lincoln*, 5 How. 279; *Green v. Finucane*, 5 How. 542.

148. A charge of fraud in a bill, must be answered; a demurrer admits the facts as charged, and if fraud be charged, it gives the court jurisdiction and must therefore be answered, even though the defence be made by plea. *Niles v. Anderson*, 5 How. 365.

149. See *Chickasaws and Chickasaw Treaty*, 3, for a case of relief in equity granted to the holder of an equitable title against a party who had obtained by fraud a seeming legal title.

150. A court of chancery will not interfere to stop a mere trespass; where therefore B. filed his bill, alleging that he had by law an exclusive privilege to erect a bridge and charge toll over a certain river, and that V. had entered on complainant's land, and with complainant's timber was proceeding to erect a bridge over the same river to be free; held, that V.'s conduct was a mere trespass for which B. had an ample remedy at law. *Blewitt v. Vaughn*, 5 How. 418.

151. See *Real Estate*, 11 and 12; when chancellor will not rescind contract for defect in title, where there has been no eviction and the covenants are independent.

152. The court of chancery has jurisdiction to decree that a bond which is void both at law and in equity, shall be cancelled. *Sessions v. Jones*, 6 How. 123.

153. Where a party who had made a deed of trust, on land to secure an usurious debt, filed a bill to enjoin a sale under it; and afterward on being sued at law on the

debt, and suffering judgment to go against him, filed an amended bill to get relief from that judgment; *held*, that no relief could be granted on the amended bill; he should have defended at law. *McRaven v. Forbes*, 6 How. 569.

154. A court of chancery has no jurisdiction to award an issue of *devisavit vel non*, on application of the parties interested; the power to do so, under the laws of this state, resides alone in the probate court. *Hamberlin v. Terry*, 7 How. 143.

155. See *Trust, &c.*, 15; for jurisdiction of equity to force a settlement of a deed of trust, and have a sale of the trust property by a creditor not embraced in it.

156. After judgment at law by a court having jurisdiction, a court of chancery cannot again revise the subject of the suit at law; it is *res adjudicata*. *Houston v. Royston*, 1 S. & M. 238.

157. From the peculiar character of slave property, a bill in chancery, it seems, will lie to recover them in specie. *Murphy v. Clark*, 1 S. & M. 221; *Sevier v. Ross*, Freem. Ch. 519.

158. See *Vendor and Vendee*, 11; under what circumstances a court of chancery will decree a rescission of contract for sale of land.

159. A court of chancery will not interfere to prevent a sale of personal property unless it be of some peculiar character, as slaves, or have some particular value by reason of which damages might not afford an adequate compensation for its loss; the remedy is at law. *Beatty v. Smith*, 2 S. & M. 567.

160. See *Executor and Administrator*, 79; a court of chancery has jurisdiction of a bill by an ad-

ministrator *de bonis non* to recover the possession of a note improperly transferred by the administrator, and also to enforce the statutory lien on it.

161. Courts of equity will interfere to correct mistakes between the original parties or those claiming under them in privity, as heirs, devisees, legatees, assignees, voluntary grantees, judgment creditors or purchasers from them with notice; where therefore N., being indebted to S. & Co., by mistake conveyed to them in trust the north-east quarter of a section of land which he did not own, supposing that he was conveying the south-east quarter, which he did own and lived on; and as soon as the mistake was discovered, N. gave the trustees a power of attorney to rectify it, which power was recorded; before the mistake was discovered judgments were rendered against N. and executions levied on the south-east quarter of the section; at the sale the trustees attended and proclaimed the facts and warned persons not to buy; the sheriff sold and conveyed under the judgments. *Held*, that a court of chancery would decree the sheriff's deed to be cancelled, and would correct the mistake in the deed. *Simmons v. North*, 3 S. & M. 67.

162. It is no valid reason for not making defence at law, that the counsel of the party failing to make the defence was indisposed; more especially where the names of two attorneys are filed to his pleadings in the court at law; he should be present himself. *Yeizer v. Burke*, 3 S. & M. 439.

163. The superior court of chancery has not jurisdiction to assist the mortgagee of property, who has obtained a decree of foreclosure in

the circuit court; the latter court is fully able to carry its decree into effect; where, therefore, a decree of foreclosure was rendered in the circuit court, the mortgaged property sold under it and execution issued afterward on the sale bond, and the mortgaged property again sold, but the sheriff appropriated the proceeds of sale to senior judgments against the purchaser at the first sale, to which appropriation the mortgagee took no exception, and at the last sale the mortgaged property was again purchased by another party, but really for the benefit of the purchaser at the first sale, and the mortgagee filed his bill in the superior court of chancery, to have his decree of foreclosure satisfied out of the mortgaged property; *held*, the chancery court had no jurisdiction. *Tooley v. Gridley*, 3 S. & M. 493.

164. If a wrong-doer has obtained the advantage in a court of law by hiding the real character of the transaction under a trustee's name; a court of equity will lend its aid to place the party injured in the situation he would have been in provided no fraud had been committed. Where therefore, E. being a private banker, discounted a note for S., but had the note made payable to a banking company, to which E. alleged that it was to be assigned; and on the maturity of the note, E. sued S. upon it in the name of and for the use of the bank, though in reality the bank had no interest in the claim; *held*, that S. would notwithstanding have the right to interpose any claim he might have against the bank as an offset, and if he were prevented by accident from interposing the offset at law, a court of equity will grant

him relief. *Stovall v. The Northern Bank*, 5 S. & M. 17.

165. Although the rule of law, which prohibits the admissibility of parol proof to vary written instruments, in general prevails in equity, yet where from mistake or fraud the writing does not truly express the intention of the parties, a court of equity admits parol proof to carry the intention into effect; where therefore, a note on its face, bore interest at the rate of ten per cent., and purported to be for a *bona fide* loan of money, it was held competent to show by parol, that the note was given in part payment for a tract of land, and not for a loan of money. *Elliott v. Connell*, 5 S. & M. 91.

166. The chancery court cannot entertain a bill to review an administration, after it has been finally settled in the probate court, where the parties in interest had a fair opportunity of being heard; but if the executor, after he has been discharged from his trust, and letters *de bonis non* been granted to another party, attempt to collect the assets of the estate, a court of chancery will enjoin him therefrom, at the instance of the administrator. *Stubblefield v. McRaven*, 5 S. & M. 130.

167. A note secured by a deed of trust, belonging to a judgment debtor, may be subjected in equity by the judgment creditor to the satisfaction of his judgment, upon his having obtained at law a return of *nulla bona*; and a sale under the deed of trust will be ordered, to pay it. *Cohen v. Carroll*, 5 S. & M. 545.

168. See *Distribution*, 8. The chancery court has no jurisdiction of a bill, by a party alleging himself to be a distributee, whose

claims have been overlooked in the distribution in the probate court; his remedy is in the latter court.

169. After judgment at law, equity cannot interpose to set it aside, upon grounds which might have been used as a defence at law, unless it were obtained by fraud. *Benton v. Crowder*, 7 S. & M. 185.

170. A court of chancery has jurisdiction of a bill, to recover of the maker the amount of a lost note; but will require a bond of indemnity against the note, and damages that might arise out of another suit. *Truly v. Lane*, 7 S. & M. 325.

171. N. filed a bill in equity to obtain relief against a judgment at law, in favor of D. on a note, which he averred he executed as a surety for the principal therein, with the understanding that D. was to be a co-surety with him, but that D. was made payee, and indorsed the note as accommodation indorser to the person for whom it was intended, and when the note became due, D. took it up and sued him thereon, and obtained the judgment at law; *held*, that the application came too late, and N. was concluded by the judgment at law. *Wellons v. Newell*, 7 S. & M. 399.

172. See *Railroad*, 6. A court of chancery may enjoin a railroad company from running their cars over a road, the right of way over which, they have not paid for.

173. W. leased to J. a tract of land for ninety-nine years, and placed J. in possession; J. being fully acquainted with the nature of W.'s title at the time; J. afterwards refused to comply with his contract, and abandoned the possession of the premises; whereupon W. sued him, and recovered

judgment at law for the consideration of the lease; J. then filed a bill to set aside the lease, recover back the money he had paid on it, and enjoin perpetually the judgment, on the ground of the statute of frauds and the defect of W.'s title; it being shown that W. was wholly divested of title, between the date of the lease and the filing of the bill, but that his title was perfect at the time the bill was filed; no fraud was proved against W.: *Held*; that J. showed no equitable ground of relief, and that his bill should be dismissed. *Jenkins v. Whitehead*, 7 S. & M. 577.

174. A purchaser of real estate, at a sheriff's sale, may come into equity for the purpose of setting aside a deed to the property, which had been made to defraud the judgment creditor; the purchaser, in such case, succeeds to all the rights which the judgment creditor had against such fraudulent deed. *Mays v. Rose*, Free. Ch. 703.

175. See *Will*, 31-44. How far court of chancery may enforce the execution of trusts arising under a will, where the probate court cannot give complete relief; and also of the jurisdiction of equity, to compel an executor to carry into execution the trusts of a will, ordering certain slaves to be sent to Liberia; and also as to jurisdiction of equity over charitable bequests; and whether the statute of 43 Eliz. is in force here on that subject.

176. A creditor of the estate of a deceased person, cannot come into equity to subject to the satisfaction of his debt, property of the decedent, in the hands of a third person who has intermeddled with, and possessed himself thereof, in such case the creditor has a plain, adequate, unembarrassed remedy

at law. *Pleasant v. Glasscock*, 1 S. & M. Ch. 17.

177. See *Executor and Administrator*; for jurisdiction of bill of discovery against; and also against executor *de son tort*.

178. An agreement between two parties that one shall hold in his name, the property of the other, and shall pay with it the debts of the latter, and use it as he may direct, is such an agreement as a court of equity will enforce *as between the parties*; and it can only be assailed as between the creditors who are thereby defrauded; where, therefore, E. filed his bill stating that he held property of W. in secret trust for the benefit of W., and to secure advances of his for W.; that W. was in arrear for money then advanced, and had fraudulently procured G. to become the purchaser with W.'s money at a tax sale of the property so held by E., and seeking to subject the property in the hands of G. to the advance so made; *held*, that a court of equity would have jurisdiction of the case; upon the answer however of G. denying the fraud, and it not being established by proof, the jurisdiction would cease. *Everett v. Winn*, 1 S. & M. Ch. 67.

179. See *Bond of Indemnity*, for jurisdiction to decree specific performance of.

180. A. having made a payment on a note which is credited on the back of it, being sued at law upon the note and permitting judgment to be rendered against him for the whole amount of the note, without pleading payment or calling the attention of the court and jury to the credit, is not entitled from his negligence, to relief in equity. *Commissioners of the Sinking Fund v. Patrick*, 1 S. & M. Ch. 110.

181. After general answer the defendant cannot raise the question of jurisdiction on the hearing, unless the defect of jurisdiction, go to the very subject-matter of the suit. *Davis v. Roberts*, 1 S. & M. Ch. 543.

182. J. H. executed a note with W. H. as surety, to L., M. & Co., and to indemnify W. H., J. H. conveyed property in trust to T; L., M. & Co. transferred the note to D. who, J. H. becoming insolvent, filed a bill to subject the property conveyed in trust to T., to the satisfaction of his debt; *held*, that the trust property was liable in equity for the payment of the note in the hands of the assignee. *Dick v. Truly*, 1 S. & M. Ch. 557.

183. A judgment in Tennessee and return of *nulla bona* upon an execution thereon, are not sufficient foundation to apply to a court of equity in this state, to subject the *choses in action* of the judgment debtor, to the payment of his debt. *Ib.*

184. See *Will*, 47-49; for jurisdiction over.

185. A creditor at large cannot come into a court of chancery, upon a purely legal claim, and enjoin his debtor from selling, receiving or disposing of his effects. *Freeman v. Finnall*, 1 S. & M. Ch. 623.

186. A bill uniting partnership and private demands, filed by one partner against another, is fatally defective. *Ib.*

187. A court of chancery will subject the *choses in action* of a debtor, in the hands of a voluntary assignee, to the payment of a debt of a judgment creditor. *Wright v. Petrie*, 1 S. & M. Ch. 282.

188. Where a judgment creditor has his execution returned *nulla*

bona, but afterwards levies the same on personal property, in which the defendant in the execution, has merely an equitable interest, and pending the levy, files his bill in the court of chancery to subject the equitable interest of the defendant, to the payment of his judgment debt; *held*, that the right of the complainant, to the equitable relief, was established by the return of *nulla bona*, and was not disproved by the levy upon property, not subject to sale under execution. *Ib.*

189. Where trustees to whom personal property had been conveyed to secure a debt, were about to sell, and were enjoined by the *cestui que trust*; *held*, that the judge granting the injunction had no authority to order the trustees to deliver the property into the complainant's possession on the unsupported showing of the bill. *Martin v. Broadus*, Freem. Ch. 35.

190. A court of equity will decree notes that have been paid and are outstanding in the hands of third persons, to be cancelled, even though claimed by assignees of the party to whom payment was made; and a bill filed against such party and the various assignees of the paid note, will not be multifarious. *Garrett v. Miss. & Ala. Railroad Co.* Freem. Ch. 70.

191. Although a court of chancery will not ordinarily take jurisdiction of a case for rent, yet where the time of payment or the amount to be paid is uncertain, or when the distress is evaded or obstructed by fraud, chancery will give relief. *Dawson v. Williams*, Freem. Ch. 99.

192. A court of chancery will keep an incumbrance alive, though seemingly extinguished, if it best

suit the purposes of justice and the intention of the parties; as, where a third party buys a tract of land on which there is a deed of trust, and the money he pays is appropriated to the extinguishment of the trust, and satisfaction is entered upon the face of it, a court of chancery will keep the trust alive in favor of such purchaser, against a judgment at law against the grantor, obtained since the execution of the deed of trust. *M'Intyre v. Agricultural Bank*, Freem. Ch. 105.

193. See *Will*; for jurisdiction of equity to compel abatement of legacy or election of legatee to make void devise, valid.

194. A court of chancery will decree the cancelment of a deed which may enable the grantee therein to throw a cloud around the title; though no title whatever would pass by a sale from such grantee. *Whitton v. Smith*, Freem. Ch. 231.

195. A court of chancery will give relief against a judgment at law where the defence was of an equitable character and could not be made at law; as where the claimant, in a trial of right of property under a junior judgment, pending the trial, has the property taken away from him by virtue of a senior judgment and execution thereon, a court of chancery will relieve him against a verdict and judgment on his claimant's bond at the suit of the junior judgment creditor. *Ferriday v. Selcer*, Freem. Ch. 258.

196. After judgment at law, or opportunity to defend there, a court of chancery will grant no relief, though the contract, on which it was rendered, were absolutely void, either for fraud in the parties or illegality in the contract; a court of law has cognizance of both, and a

failure to defend there precludes relief in chancery. *Allen v. Hopson*, Freem. Ch. 276; *Long v. U. S. Bank*, Ib. 375.

197. A court of chancery has no jurisdiction of a suit against one defendant, a non-resident, not served with process, and no proceeding *in rem* instituted against him. *Hunt v. Johnson*, Freem. Ch. 282.

198. In order to reach equitable assets or other things not subject to execution at law, the remedies at law must be exhausted by the return of an execution unsatisfied; and no state of facts will excuse the omission of such return; and where there are several joint debtors, he must have the same return as to all, unless one of them should stand in the situation of a surety to the others. *Parish v. Lewis*, Freem. Ch. 299.

199. The rule is otherwise where you seek *legal* assets and desire to remove obstacles which obstruct your course at law, there you need only show a judgment. *Ib.*

200. See *Garnishment*; — failure to defend suit by assignee of a note precludes the maker from setting up in equity a former judgment on the same note against him as a garnishee of the payee.

201. If remedy be at law, yet the defendant answer generally, he waives the objection and cannot question the jurisdiction on the hearing. *Osgood v. Brown*, Freem. Ch. 392.

r. *Marshalling Assets.*

202. Where there is a mortgage on slaves and a judgment lien older than the mortgage, a court of chancery will not annul a sale of the property embraced in the mortgage, made under execution on the judgment, on the ground that there

was other property of the mortgagor sufficient to satisfy the judgment without resorting to the mortgaged property; such application comes too late after sale, though it would have been complied with, if made prior thereto. *Drake v. Collins*, 5 How. 253.

203. Where a judgment has been obtained against three partners, and an execution has issued and been levied on the property of one of the partners, which, subsequent to the judgment, but prior to the levy, he had conveyed to trustees to secure a different indebtedness; a court of chancery will not, at the instance of such subsequent creditor, compel the judgment creditor to levy his execution equally on the property of the co-partners. Such decree would delay the judgment creditor until the partnership accounts between the judgment debtors could be adjusted, to ascertain which partner is entitled to contribution from the other partner, or else would convert a joint into a separate decree. *Markham v. Calvit*, 5 How. 427.

204. Where a judgment at law has been obtained against the vendor of real estate, and prior to the sale and before a levy under it he sells a portion of the land to A., and afterward a portion to B., and still a third portion to C., and the execution on the judgment is levied on the portion sold to A., he can, by bill in equity, compel the judgment creditor to levy his execution on that property which the vendor aliened subsequently to the sale to him; nor can the portion sold to A. be subjected to the execution until the residue aliened subsequently is exhausted. *Pallen v. The Agricultural Bank*, Freem. Ch. 419. (The decision in this

case has been affirmed, on appeal, by the high court, of errors and appeals. The decision of that court will be found in vol. 8 of S. & M. Rep.)

205. A bill to marshal assets cannot be sustained where the fund, to which the junior incumbrancer seeks to turn the senior, is not fully adequate to the satisfaction of the prior lien, and the remedy for reaching it prompt and efficient; a fund in litigation is therefore not such a fund. *Briggs v. Planters Bank*, Freem. Ch. 574.

206. Where a bill was filed by the assignee of a note secured by mortgage against a prior judgment creditor, and also against the mortgagor to marshal assets, and the judgment creditor was permitted to proceed with his execution; *held*, that the proper decree as between the other parties was to decree a sale of the mortgaged property, subject to the lien of the judgment creditor. *Ib.*

207. The rule of marshalling assets, by which the personal property was first subject to debts, then the land descended, and then the land devised, is entirely consistent with our statute law. *Fisk v. McNiel*, 1 How. 535.

s. *Mortgage.*

208. See *Mortgage*, 10-13; where a bill of sale is held to be a mortgage, and the answer of the defendant that he has bought the equity of redemption required to be proved.

209. See *supra*, *Chancery*, tit. *Marshalling Assets*.

210. A. & B. being indebted in a joint note to C., each executed mortgages upon their respective property to secure the note; C. filed his bill against both to fore-

close both mortgages; *held*, on demurrer to the bill, that it was not multifarious, and that a decree to foreclose both mortgages could be rendered at the same time. *Wilcox v. Mills*, 1 S. & M. Ch. 85.

See *infra*, *Mortgage*.

t. *New Trial*; and herein of *Reasons for not making defence at law*.

211. See *New Trial*, 27, when chancellor will grant new trial at law.

212. Where a bill for a new trial at law makes out a proper case, and is taken for confessed, a decree for a new trial follows as a matter of course. *Joslin v. Coffin*, 5 How. 539.

213. Although a judgment without notice is void, if a bill be filed to obtain a new trial at law on the ground of want of notice of the pendency of the action, and the answer deny the want of notice, and there be no proof to sustain the allegation of the bill, it must be dismissed, yet without prejudice if there has been no trial on the merits in the court below. *Wellons v. Newell*, 7 S. & M. 399.

214. It is well settled in courts of equity as well as of law, that a party is not entitled to relief after verdict, upon testimony, which with ordinary care and diligence he might have procured and used upon the trial at law; a new trial will therefore not be granted by a court of equity, of a suit at law, wherein judgment was rendered in favor of the plaintiff for medical services on the ground of evidence discovered since the trial at law, which consisted of the opinions of physicians as to the value of the services rendered, and the nature of the disease for attendance on which the

fees were charged; *held*, that ordinary diligence would have discovered this testimony, and the new trial should not therefore be granted. *Lee v. Hooker*, 7 S. & M. 601.

215. R. obtained a judgment against F. in Louisiana by default, and bought a tract of land of F. in discharge of the judgment, and gave a receipt accordingly; subsequently, R. fraudulently procured the judgment by default in Louisiana to be rendered final, and thereupon brought a record thereof to Mississippi and sued F., who permitted judgment to go by default and filed his bill, alleging as his reason for not defending at law, that the final judgment in Louisiana was *junior* to the date of the receipt; *held*, that the defence of F. was purely legal, and that the reason given for not making defence at law was insufficient. *Fletcher v. Rapp*, 1 S. & M. Ch. 374.

216. Courts of equity have power to grant new trials at law, where, from the fraud of the one party, or unavoidable accident or unforeseen necessity the other party, without negligence on his part, has been unable to make out his case on the first trial. *Herring v. Winans*, 1 S. & M. Ch. 466.

217. H., being an old and infirm man, unable to read, and being sued out of the county of his residence, sends to his lawyer, residing in the county where the suit is brought, the nature of his defence, and instructs him to defend the case; the letter is lost in the transmission, and judgment is obtained against H. by default; *held*, upon the application of H. for a new trial in a court of equity, that his excuse for not making his defence at law was sufficient. *Ib.*

218. M. indorsed a note in favor

of G., upon which the maker afterwards paid part, and renewed the balance by a new note, which M. also indorsed; suit was afterwards brought, and judgment obtained against M., when he exhibited his bill, stating that the note had been given for an illegal consideration, which he was not aware of, until after judgment was given against him, and therefore he did not defend at law; *held*, that the excuse for not making defence at law was insufficient, and equity would grant no relief; yet, where the makers of the note, when sued at law, had been released from their liability on the ground of the illegality of the consideration, the indorser who had made no defence in ignorance of the consideration, should be entitled to relief and be allowed to make the same defence. *Miller v. Gaskins*, 1 S. & M. Ch. 524.

219. An allegation, that the complainant did not acquire knowledge of the defect of his vendor's (who was an administrator) power to sell, till after the judgment at law in favor of the vendor, for the purchase-money, is sufficient excuse, if true, for not having made the defence at law. *Crisman v. Beasley*, 1 S. & M. Ch 561.

See *infra*, *New Trial*.

u. Parties.

See *Parties, infra*.

220. A party, materially interested in the progress of the suit, ought to be made a party, and it will be error to decree affecting his rights without making him such; as where a judgment creditor garnishees a debtor of his judgment debtor, and the judgment debtor answer that the garnisheed debt has been assigned, it will be error to make a decree without making the

assignee a party. *Carman v. Watson*, 1 How. 333.

221. Where property has been sold under a judgment and bought by a third party, and still another party files a bill in equity, asserting title in the property thus sold, the judgment creditor, under whose judgment the property was sold, is not a proper party to the bill, and it will be multifarious as to him. *Morris v. Dillard*, 4 S. & M. 636.

222. An assignor of a note who has parted with all his right in it, and has no interest in the matters in controversy, and against whom no relief or discovery is prayed, *held*, on demurrer not to be a necessary party to the bill. *Everett v. Winn*, 1 S. & M. Ch. 67.

223. A trustee to sell property, who has advertised it for sale, though the mere agent of the *cestui que trust*, and without interest in the controversy, is yet a proper party, to a bill filed, to enjoin the sale of the property embraced in the trust, on the ground of a fraudulent combination on the part of the *cestui que trust* and another person, to defraud the complainant of his right in the trust property. *Id.*

224. Where property is sold in Louisiana, at a probate sale, as the property of the succession and the community of the deceased husband and of his wife, and a mortgage is taken to secure the purchase-money, the wife of the intestate is a proper party to a bill filed by the administrator of the husband in Mississippi to foreclose the mortgage on the property which has been removed into Mississippi. *Stacy v. Barker*, 1 S. & M. Ch. 112.

225. Where the parties in interest are so numerous as to render it

inconvenient, if not impracticable, to make them all defendants without great delay and expense, and justice can be done between the parties before the court, without affecting the interest of the others, the court will proceed to a decree, notwithstanding the want of parties; as where there are one hundred partners, who had each executed a mortgage to secure the debts of the partnership, and some of the partners were dead, leaving numerous representatives; *held*, that the mortgagee might foreclose each mortgage by a separate suit against each partner without making the others parties. *Boisgerard v. Wall*, 1 S. & M. Ch. 404.

226. A prior owner of a note who, while such, obtained judgment at law against the maker of the note, and afterwards, and while the note was lost, transferred the contents of the note, and the right to control its proceeds, has the legal title to the note, and is a proper party to a bill filed to recover the amount of the lost note from the indorsers. *Smith v. Walker*, 1 S. & M. Ch. 432.

227. D. filed his bill against Y., executrix of W. Y., alleging that the estate of W. H. was indebted to him, and that W. Y., while administrator of W. H.'s estate, had rendered himself liable to that estate, and sought to subject that liability to the payment of the debt of the estate of W. H. to him; *held*, that the administrator, *de bonis non*, of W. H. was a necessary party to the suit, the estate of W. H. not being finally settled, or alleged to be insolvent. *Davis v. Yerby*, 1 S. & M. Ch. 508.

228. P. and L. having sold land to H., and given bond for title, afterwards sold and conveyed it to

B. and M., who had knowledge of the prior sale; H. filed his bill to obtain a title and did not make P. a party thereto; *held*, that P. was not a necessary party thereto, the legal title being in B. and M., as trustees for H. *Hines v. Baine*, 1 S. & M. Ch. 530.

229. Infants who take in remainder, should be made parties to a bill touching the property. *Hunt v. Booth*, Freem. Ch. 215.

v. Pleading.

230. See *Executors and Administrators*, c. 25, 26 and 27; as to multifariousness (in suing the same person in the same bill, as executor and as guardian for neglect in both capacities).

231. Distinct matters against different defendants cannot be claimed in the same bill; though if a general right be claimed, even though the defendants have distinct interests, the bill will lie; as where A. has a claim against B. who is dead, he may enforce his claim in equity against C. and D. and E. who were at different times administrators of B. and against their respective sureties; but where one of these administrators has died, and was guilty of a *devastavit*, for which the bill sought to make his individual estate liable; the executor of C. and the sureties of the executor could not be united in the same suit with D. and E. and their respective sureties, to obtain payment of the debt due by B., as there was no connecting interest. *McNeill v. Burton*, 1 How. 510.

232. Unconnected parties having a common interest centering in the point in issue in the cause, may unite in the same bill; as where different judgment creditors of the same person, seek to subject his

property to their judgments. *Comstock v. Rayford*, 1 S. & M. 423.

233. A bill framed with a two-fold aspect, either to procure a specific delivery of property, or to enforce a supposed lien upon it, is not demurrable for duplicity; as where an administrator sold his intestate's property at private sale, and the administrator *de bonis non* sues either for the property or to enforce the statutory lien. *Baines v. McGee*, 1 S. & M. 208; *Murphy v. Clark*, ib. 221.

234. Although it is improper to allow a supplemental bill which contains nothing that was not fully known to the complainant at the time he filed his original bill, yet if a supplemental bill be filed and be not objected to in the court below and the chancellor entertain jurisdiction of it, the objection will not prevail in the high court. *Walker v. Gilbert*, 7 S. & M. 456.

235. A bill to set aside a sale of land under execution, making the several purchasers at the sale, though they bought different and distinct interests, and also the plaintiff in the execution under which the sale was made, all defendants, is not multifarious, on the ground of the improper joinder of parties. *Delafield v. Anderson*, 7 S. & M. 630.

236. A bill which sets up one sufficient ground for equitable relief, and then states another upon which no relief can be had, is not thereby rendered multifarious; in such case the defendant should demur to one part and answer to the other; or answer generally; and object at the hearing to that part which is without claim to equitable cognizance; to render a bill multifarious, the matters thereof must not only be separate and distinct,

but each must be of a character entitling the complainant to separate equitable relief; and if a bill be multifarious, it cannot be demurred to on that account, unless the prayer be also multifarious. *Pleasants v. Glasscock*, 1 S. & M. Ch. 17.

237. Where the complainants in a bill in chancery assert one general claim, and the defendants have a common interest in the point litigated, they are properly united, though their rights as to the subject-matter of the suit may be separate; A. being a judgment creditor of B., filed his bill in equity against B., C., D., E. and F., charging that C., D., E. and F., were each respectively in possession of property belonging to B. and conveyed by B. to them individually to defraud his creditors, and seeking to subject this property in the hands of these different persons to the payment of his judgment; *held*, upon the demurrer of these defendants and their answers denying fraud, that the bill was not multifarious. *Wright v. Shelton*, 1 S. & M. Ch. 399.

238. It is not necessary to the joinder of different defendants in the same bill, that a privity should exist between each two of the defendants, provided a privity exists between each of the defendants separately and the other defendants, upon whom the *gravamen* of the bill rests. *Ib.*

239. A supplemental bill cannot set up new substantive matter having no connection with the original bill, and upon which a separate and distinct decree must be made, without reference either to the parties or the matter of the original bill; it may introduce new parties and new matter, but they must be connected with the matter of the orig-

inal bill; where therefore an original bill was filed by an administrator, *de bonis non*, to recover the possession of slaves sold by the administrator illegally, or to recover the note which he received for the price; and a supplemental bill was filed against the vendees of the vendee of the administrator, to subject the slaves in their hands to the statutory mortgage reserved by law on a sale of intestate's property by the administrator, the purchase-money of his vendee not having been paid; *held*, that the supplemental bill was bad on demurrer. *Dickson v. Poin-dexter*, Freem. Ch. 721.

240. Persons not parties defendant to the original bill, have no right to file a cross-bill in the case; and where the complainants elect to treat such proceeding as a cross-bill, by answering it, it will not be dismissed on motion before the final hearing; but whether any decree can be given upon such bill at the final hearing; *quære?* *Payne v. Cowan*, 1 S. & M. Ch. 26.

241. A defendant in his cross-bill against the complainant, cannot introduce new and distinct subjects of litigation from those which are in controversy in the original suit; though he may assert any right in the property in controversy not noticed in the original bill, by way of a cross-bill. *Fletcher v. Wilson*, 1 S. & M. Ch. 376.

w. Practice.

242. By the act of 1828, causes in chancery, where there is answer or plea, are triable at the term succeeding the return term, and either party may take depositions after issue. *Carman v. Watson*, 1 How. 333.

243. Exhibits cannot be proved by *ex parte* affidavits, and it is ques-

tionable whether they can be proved in open court; and whether proof ought not to be made before an examiner. *Ib.*

244. It is not error to refuse to permit a party to plead, unless it appear what the party intended to plead. *Carmichael v. Hunter*, 4 How. 308.

245. If a complainant suffer two entire terms to elapse, after filing his bill, without taking any further step to prosecute his suit, the same will be dismissed for want of prosecution. *Doyle v. Devane*, Freem. Ch. 345.

246. Where a cause is submitted for final hearing, and some point in the case is left unproved, or is not sufficiently explained, it is in the power and discretion of the chancellor to remand the case to the docket, and direct it to stand over for farther proof. *Planters Bank v. Courtney*, 1 S. & M. Ch. 40.

247. A cause cannot be submitted, against the consent of the complainant, for final hearing at the same term of the court at which the answers are filed; the complainant is entitled to the succeeding term to take testimony. *Everett v. Winn*, 1 S. & M. Ch. 67.

248. Where a bill for an injunction had been filed twelve months, and the answer, denying its allegations, been filed four months, and by law, the complainant was authorized to take testimony in thirty days after the bill was filed, and a motion was made to dissolve the injunction; *held*, that a continuance of the motion will not be granted to enable the plaintiff to procure testimony to sustain his bill. *Freeman v. Fin-nall*, 1 S. & M. Ch. 623.

x. Publication.

249. In order to authorize a

publication against a non-resident defendant to a suit in chancery, it must appear in the record, by affidavit, that such defendant is a *non-resident* of the state; an affidavit merely that he is a *citizen* of a different state, will not be sufficient. *McKiernan v. Massingill*, 6 S. & M. 375.

y. Purchaser without Notice.

250. To protect himself as a purchaser without notice, the complainant must aver that fact in the bill. *Chew v. Culvert*, Walk. 54.

251. A person standing by in silence when his property is sold, does not forfeit his right, if the purchaser had other knowledge of his title. *Ib.*

252. One who receives a note or property, as an indemnity for a former liability, is not a *bona fide* assignee or purchaser for a valuable consideration without notice, but takes subject to the equities of the other parties. *Brooks v. Whitson*, 7 S. & M. 513.

253. To constitute a *bona fide* purchaser, there must be a parting with money or property, or the doing some act upon the faith of the purchase itself, which cannot be retracted; a purchaser, therefore, at a sale, under his own judgment, is not a *bona fide* purchaser without notice. *Rollins v. Callender*, Free. Ch. 295. Nor one who purchases for a preëxisting debt. *Agricultural Bank v. Dorsey*, Free Ch. 338.

254. He who rests his defence on the fact of being a *bona fide* purchaser without notice, must deny notice fully, positively and precisely, though it be not charged on the other side; and must also deny all knowledge of the facts charged, from which notice may be in-

ferred; an answer, therefore, denying "actual knowledge, information other than, &c. earlier information, *detailed* information, &c." is not a sufficient denial of notice. *Harper v. Reno*, Freec. Ch. 323.

255. A purchaser, although he may have no notice at the time of his purchase, yet if he receive notice before he makes a payment of the purchase-money, the land in his hands becomes bound for the prior equitable lien, to the extent of the unpaid purchase-money; and if he pay the purchase-money after he has received notice, it will be in his own wrong. *Ib.*

256. Giving up an old note with sureties on it, or relinquishing a security, constitutes a *bona fide* purchaser without notice. *Agricultural Bank v. Dorsey*, Freem. Ch. 338.

257. Taking property in payment of a preëxisting debt, does not make the buyer a purchaser for valuable consideration, in the eye of the law, as against one holding a prior equity. *Rowan v. Adams*, 1 S. & M. Ch. 45.

258. W. being about to purchase a tract of land, was informed that R. & H. had "*some sort of claim to it*;" held, that this was sufficient to put him on the inquiry. *Ib.*

259. In a bill filed to foreclose a mortgage upon property, which has passed by sale from the mortgagor into the possession of third persons, it is not necessary to allege in the bill that the persons in possession had notice of the mortgage; that a party is a *bona fide* purchaser without notice, is purely a matter of defence, and must be set up by the party who would avail himself of it, whether notice be charged or not.

Stacy v. Barker, 1 S. & M. Ch. 112.

260. Where a bill is filed to foreclose a mortgage on property in the hands of third persons, in possession of the property by title derived from the mortgagor, the allegation that they held by a "*pretended purchase*," is equivalent to a charge of notice of the mortgage. *Ib.*

261. A vendee who would protect himself against a prior equity, upon the ground of being a *bona fide* purchaser without notice, must deny notice fully, positively and precisely, even though it be not charged on the other side. *Jenkins v. Bodley*, 1 S. & M. Ch. 338; *Herring v. Winans*, 1 S. & M. Ch. 466.

262. Want of notice protects a purchaser against "a latent equity only, not against the legal title;" in the latter case, the maxim, *caveat emptor*, applies. *Jenkins v. Bodley*, 1 S. & M. Ch. 338.

z. Real Estate.

See *infra*, Real Estate, and Vendor and Vendee.

263. An injunction should be granted against the collection of the purchase-money, where there is a deficiency in the land. *Simmons v. Lard*, Walk. 159.

264. See *Real Estate*, 4 and 5. As to rescission of contract for want of title to land. *Gale v. Green*, Walk. 159; and for mutual error as to ownership, *Harrison v. Stowers*, Walk. 165.

265. See *Real Estate*, 7; where vendor has no title and vendee not evicted, vendor can recover purchase-money.

266. A court of chancery will not enforce the execution of a contract for the sale of a house and

lot, where only half the house and ground can be obtained. *Terrell v. Farrar*, Walk. 417.

267. See *Chancery*, title *Time*; when time is of the essence of a contract in equity, and when holder of a legal title as security for the payment of a debt due for the purchase-money, will be decreed to convey to the debtor though he has not paid the debt at the stipulated time.

268. The vendor's equitable lien for the unpaid purchase-money of land does not pass to his assignee of the note given for the payment of such purchase-money; but it seems if the vendor take up the note, the lien will be restored to him. *Briggs v. Hill*, 6 How. 362.

269. Where the vendor of land has given a title bond to the vendee to make title when the purchase-money is paid, and taken personal security from the vendee, and afterward assigns one of the notes executed for the purchase-money, the assignee of such note could not maintain a bill to subject the land to the vendor's equitable lien; the only way to subject the land to the debt would be by bill to compel the vendee to a specific performance of his contract. *Burke v. Gray*, 6 How. 527; *sed aliter*, it may be done and the land subjected by the assignee to the payment of the debt. *Dollahite v. Orne*, 2 S. & M. 590; *Tanner v. Hicks*, 4 S. & M. 294.

270. Where the interest of the vendee of real estate, who has taken a bond for title and has paid the purchase-money, is sold under execution, the purchaser must come into a court of equity to enforce his right; as he has not the legal title he cannot maintain ejectment. *Thompson v. Wheatly*, 5 S. & M. 499.

aa. *Receiver.*

271. See *Appeal*, 23, 24; the defendant may appeal from the appointment of a receiver, but the appeal will not suspend the decree unless the appeal bond is approved by the chancellor.

272. The general rules which regulate the appointment of a receiver are, 1. That the plaintiff must shew either that he has a clear right in the property itself; or that he has some lien upon it; or that the property constituted a special fund to which he has a right to resort for the satisfaction of his claim: and 2. That the possession of the property by the defendant was obtained by fraud; or that the property itself, or the income arising from it, is in danger of loss from the neglect, waste, misconduct or insolvency of the defendant: 3. Where notice is possible it must be given. *Mays v. Rose*, Freem. Ch. 703.

273. Where a purchaser of real estate at sheriff's sale filed his bill in equity to set aside a fraudulent deed made by the judgment debtor, and it appeared that the rents and profits of the property were in danger of being lost by the fraud and insolvency of the party in possession; held, that a court of chancery would appoint a receiver to take charge of the property. *Ib.*

bb. *Rehearing.*

274. On appeal from chancellor's decree to the supreme court, newly discovered evidence cannot be admitted; nor can the refusal of the chancellor to grant a rehearing be reviewed upon appeal; but the chancellor should grant it upon the application of two counsel. *Hoggatt v. Hunt*, Walk. 216.

275. A rehearing will be granted, as a general rule, when the party applying has complied strictly with the rules of the court in procuring the certificate of two respectable counsel in support of it, but not otherwise. *Cotton v. Parker*, 1 S. & M. Ch. 125.

cc. *Relief*.

276. If a party have ground of relief and his bill exhibit it, even though he may have mistaken the relief he asks for, yet if the other party have answered fully on the merits, the court will grant him such relief as he shows himself entitled to. *Gildart v. Starke*, 1 How. 450.

277. Relief will not be granted, even on *pro confesso*, against part of the defendants, where it appears from the bill and answers of other defendants, that the complainant is not entitled to it. *Minor v. Stewart*, 2 How. 912; *Russell v. Moffitt*, 6 How. 303.

278. Where a complainant prays for a particular relief, *and* for other *and* further relief, he can have no relief inconsistent with the specific relief asked, even though there may be just foundation for it in the bill; in such case the prayer for *other relief* must be *in the disjunctive*. *Pleasants v. Glasscock*, 1 S. & M. Ch. 17.

dd. *Revivor*.

279. Where a defendant in a judgment at law files a bill for an injunction, upon his death the bill cannot be revived in favor of his administrator *ad colligendum*. *Irwin v. Roach*, Walk. 386.

280. Decrees in chancery may be revived by *scire facias*. *McCoy v. Nichols*, 4 How. 31.

281. Where the demurrer to a

bill is overruled and the defendant allowed ninety days in which to answer, and the complainant dies before the next term of the court, and the bill is revived at that term in favor of the administrator of the complainant; and on the same day of the revival, the defendant having failed to answer, the bill is taken for confessed against him, and a decree entered accordingly, it will be error; the defendant should have been allowed some day for the purpose of answering the bill of revivor. *Upshaw v. Hargrove*, 6 S. & M. 286.

ee. *Rules of Court*.

282. The interpretation of the chancellor of the rules of his court are a safe precedent for the high court of errors and appeals, and where, notwithstanding a rule of practice, that no motion to dissolve an injunction, on the face of the bill, would be received, yet, if the chancellor entertain such motion it will be considered that the chancellor thought the rule inapplicable to the case; and it seems that such a rule ought not to apply to a case where no decree could be made if the facts were admitted. *Walker v. Gilbert*, 7 S. & M. 456.

ff. *Sale by Commissioner*.

283. A sale by a commissioner under a decree to foreclose a mortgage, is incomplete, and may be set aside before confirmation; but such a sale may be confirmed by the act of the parties, as well as by the order of the court; and it will be a confirmation if the complainant accept the sale bond for the purchase-money, and issue executions on it after it has ripened into judgment. *Tooley v. Gridley*, 3 S. & M. 493.

284. Where a decree of foreclosure ordered a sale, on a credit of six months, there being no law authorizing a sale on such credit, and the sale took place, and was acquiesced in by the complainant, who accepted the sale bond, and issued executions on it; *held*, that it was too late for the complainant to object that the decree was illegal. *Ib.*

285. Whether, where a sale is made on a credit under a decree of foreclosure, a lien, similar to the vendor's lien, is not retained by the court, as ultimate security, without an express reservation in the decree to that effect, *quære*? If such lien exist it might be enforced in a different court from that which rendered the decree. *Ib.*

286. A decree, ordering a sale of mortgaged premises, which directs the commissioner to sell the property, make the deed, and pay the complainant what is due to him; is informal, it should be interlocutory, and should require a report to the court of the sale, for its confirmation. *Ib.*

287. In judicial sales of personal property, as by the commissioner of the chancery court in the sale of mortgaged property, the right passes by the delivery, and the purchase and ownership may be proved by parol; the absence, therefore, of a perfect bill of sale from the commissioner, will not affect the validity of the sale, or stop an execution on the sale bond for the purchase-money. *Conger v. Robinson*, 4 S. & M. 210; *Robertson v. Haun*, Freem. Ch. 265.

288. The mortgage, decree of sale, and the report thereof, on a bill to foreclose a mortgage, are all to be taken together, as parts of an entire thing; and if the decree

follow the mortgage, in the description, and the report certifies that the decree was executed by a sale of the property therein described, the report is sufficiently certain as to the property sold, though it be not described in it; nor will the omission of the commissioner to state, in his report of the sale, the name of the purchaser, or the amount of his bid, though it make the report defective, be such a defect as will prevent the issuance of an execution on the sale bond. *Ib.* 4 S. & M. 210.

289. And though it is necessary that every such sale should be confirmed by the chancellor, before it is valid, yet, if the purchaser thereat, before an actual confirmation of the sale by the court, move to supersede an execution which has issued against him on the sale bond, and the chancellor refuse to grant the *supersedeas*, the refusal will be equivalent to a direct confirmation of the sale. *Ib.*

290. If the purchaser of slaves, at a sale by a commissioner in chancery, hold the same slaves decreed to be sold, it is immaterial what name may be given them in the commissioner's bill of sale, and whether those names differ from the names in the decree. *Ib.*

291. In sales made by order of the chancery court, the court itself is the vendor, and the commissioner its mere agent; the whole proceeding, from the sale to its ratification, is under the control of the court, and even after confirmation, if any fraud, error, or mistake, have intervened, injuriously affecting the interest of the parties, the court will, on motion of the purchaser, remedy the evil by a *supersedeas*, against the collection of the sale bond, or ordering a re-sale, if necessary; and

this may be done on mere petition, and the party not be driven to a bill. *Robertson v. Haun*, Freem. Ch. 265.

292. A commissioner in chancery, to effect a sale by order of court, has no authority or power to substitute one purchaser for another, without the entire assent of the first purchaser. *Vannerson v. Cord*, 1 S. & M. Ch. 345.

293. Where a commissioner makes a sale of mortgaged property, and the purchaser fails to comply with the precedent requirements of the decree, the commissioner has no authority to receive a bond from another person, for the amount of the purchaser's bid; but the property remains in his hand, as if no sale had taken place. *Ib.*

294. A commissioner, having advertised the property for sale, upon a failure from any cause to sell on the appointed day, has power, unless his authority is restricted by the decree, on its face, or limited to a single specified time, to advertise the property for sale, again and again, until he effectuate the object of his appointment. *Ib.*

295. The powers of a commissioner, to sell property by decree of the chancery court, are precisely the same that a sheriff has, when a writ of *feri facias* is placed in his hands. *Ib.*

296. A sale of mortgaged premises by a commissioner, is a sale by the court, and is not complete, or title passed thereby, until a report thereof is made to the court, and that report confirmed; in case of any error in the proceedings in a commissioner's sale the court will, even after confirmation of the report, set aside the confirmation, and rectify the evil; and, if necessary, upon petition, order a re-

sale. *Tooley v. Kane*, 1 S. & M. Ch. 518.

gg. *Specific Performance.*

297. A court of chancery will not enforce the execution of a contract for the sale of a house and lot where only half the house and ground can be obtained. *Terrell v. Farrar*, Walk. 417.

298. A court of chancery will not enforce the performance of promises made from benevolent feelings, without consideration. *Mercer v. Stark*, Walk. 451.

299. Where an agreement in parol between an intestate and the defendants is set up in a bill, by which agreement the complainants, the administrators of the intestate, claim title to the personal property in controversy, they must establish such agreement by clear and positive testimony, or it will not be enforced; as where a married woman being a distributee of her first husband's estate agreed with the brother of her husband, whose estate was much embarrassed, that if he would administer on the estate and carry it through its embarrassments she would relinquish to him her distributive share in it, and he had administered, and she had not relinquished her distributive share, and it did not appear that he in his life-time claimed a right to it under that agreement; a court of equity, at the instance of his administrators, would not decree a specific performance of it. *Montgomery v. Norris*, 1 How. 499.

300. P. filed a bill for the specific performance of a contract by which M. agreed to convey four lots to him on payment of a certain sum down and the residue in instalments, and averred the tender of the sum due in cash and of

the notes for the residue, but that M. refused to make the deed on the ground that he had no title to one of the lots, but was willing to convey the others; *held*, that P. was entitled to relief on the bill against M. *Mathews v. Patterson*, 2 How. 729.

301. Where two parties agree in writing to the sale and exchange of land, on terms to be agreed on and established by arbitrators; and the arbitrators proceed to make their award in the mode agreed on, a court of chancery will decree a specific performance of such award. *Cook v. Vick*, 2 How. 882.

302. A court of equity will correct a mistake in the description of lands conveyed by a deed. *Leonard v. Austin*, 2 How. 888.

303. Where property was sold under a deed of trust and bought by A. for \$3600, who paid \$800 in cash, was to pay \$400 more the next day, and the residue was to be paid in one and two years, for which his notes were to be given, and A. being put into possession of the property, refused to pay the money or execute his notes; the trustee not having made A. a deed, after waiting nearly two years, sold the property a second time, under the deed of trust, to B., and made him a deed. B. sued A. in ejectment; whereupon A. filed a bill for a specific performance of the first contract of sale, averring his readiness to pay the money due but not tendering it in court; *held*, that A.'s laches excluded him from the relief he asked and a specific performance was refused. *Lewis v. Woods*, 4 How. 86.

304. M. agreed to convey certain lands to R., who executed his note for an agreed sum as the price; M. failed to convey the lands and R. filed a bill for a specific per-

formance of the contract, averring that since the contract he had understood that one P. was joint owner with M. of the lands; and that he had also understood that M. had conveyed his half by deed to P.: that if such an arrangement had been made it was by collusion between P. & M. to defraud R.; that when M. sold to R. he had authority from him to sell; the bill called for a discovery as to what title M. and P. each had, what consideration passed from P. to M. and what money was paid and how secured. M. answered that the land was entered in the name of P. & M. with the money of P., who was to have a lien on the part of M. until the money and interest were paid; that M., when he sold to R., sold subject to P.'s ratification, who refused to confirm it, whereupon M. offered R. his half at the same rate R. had agreed to buy the whole at, which R. refused, and that M., being unable to pay P., had conveyed his half to him instead of the money; the bill was taken for confessed as to P.; *held*, that the answer of M. was responsive to the bill and evidence, and that R. could have no relief as against either M. or P. *Russell v. Moffit*, 6 How. 303.

305. The payment of part of the purchase-money will not of itself take a case out of the statute of frauds, so as to entitle a vendee to a specific performance of the contract; and if the vendor rely on possession he must establish a direct connection between the contract and the possession of the vendee. *Hood v. Bowman*, Freem. Ch. 290.

hh. *Time, Effect of in Equity.*

306. Time is not of the essence of a contract in equity, and though contracts mutual and dependent are

enforced at law, equity will grant relief by extending the time ; as where R. advanced money to J. to buy a tract of land on condition that the title to the land should be made to R. as a security for his repayment, and with the agreement that J., on payment of the money by a stipulated time, should have the title conveyed to him ; the purchase being made, J.'s failure to pay the money at the fixed time will not deprive him of the land, R. will be decreed a trustee for J., and on payment of the money a conveyance of the land will be decreed. *Runnels v. Jackson*, 1 How. 358.

307. Time is never important in equity unless made so by the very terms of the contract, or is necessarily so from the very nature of the property, about which the contract is made. *Fletcher v. Wilson*, 1 S. & M. 376.

CHICKASAWS AND CHICKASAW TREATY.

1. The treaty between the United States and the Chickasaws, which provided that any white man who brought and sold goods in the nation contrary to the treaty, &c.; should forfeit them, was not violated by bringing the goods into the nation merely ; to justify their seizure as forfeited goods, there must have been an actual sale ; a plea therefore to an action of trespass for seizing such goods, which averred an *offer to sell*, but not a sale, would be bad and no justification. *Mingo v. Goodman*, 1 How. 552.

2. Where by the laws of the Chickasaw tribe, the husband acquired no right to the property of his wife, and while those laws were operative the wife of a Chickasaw

conveyed a slave by deed of gift, to her daughter, and afterwards the laws of Mississippi were extended over that tribe, the slave thus given to the daughter would not become subject to the debts of her father ; the rights of the mother to her separate property would not be affected, nor her power to control it, by a subsequent law. *Fisher v. Allen*, 2 How. 611.

3. Where, by the 6th article of the treaty with the Chickasaws, it was provided " that reservations of a section to each shall be granted to persons, male and female, not being heads of families, who were of the age of twenty one years and upwards, a list of whom, within a reasonable time shall be made out by the seven persons therein before mentioned, and filed with the agent, upon whose certificate of its believed accuracy the register and receiver shall cause said reservations to be located upon lands fit for cultivation, but not to interfere with the settlement rights of others ; " it was *held*, that a title *in fee*, passed to such Indians as were above the age of twenty-one, as fully as though a grant had been executed, not perfected however, until a location was made, which was necessary to give identity. The Indians thus clothed with perfect title by location could only part with it in the mode pointed out in the treaty ; which was that at least two out of the seven persons named must certify that the Indian was capable of taking care of his affairs ; that the agent must certify to the same thing, and also that a fair consideration had been paid, and that the deed of conveyance was to be approved by the President of the United States or his agent, and to be recorded accord-

ing to the laws of the state where the land was situate; but if an Indian make the deed, it will clothe the vendee with an equitable title, to be perfected by the after procurement of the requisite certificates, and if the vendee be prevented from procuring them by the fraud of a third party, who by substituting a different Indian for the one entitled to the reservation, gets a deed from such false Indian, and procures by this fraud the requisite certificates, and has the deed approved and recorded, a court of equity will protect the purchaser from the real Indian who is in possession, from the fraudulent vendee of the false Indian, and will restrain such fraudulent vendee from proceeding by action to dispossess the vendee of the real Indian; and a court of equity will remove the impediments interposed to the title of the vendee of the real Indian, by the fraud of the other. *Niles v. Anderson*, 5 How. 365. *Anderson v. Lewis*, Freem. Ch. 178.

4. The agents under the treaty to make the requisite certificates to enable Indians to pass a perfect title, are but ministerial and not judicial officers; but if they were the latter, their acts, if procured by fraud, would be set aside. *Ib.*

CHOSE IN ACTION.

1. See *Assignor and Assignee*, 1 and 2, as to the rights of the assignee of an open account. *Defrance v. Davis*, Walk. 69.

2. Instruments payable to C. D., curator of the estate of E. D., deceased, or to the legal representatives of said estate, are choses in action. *Cushing v. Gibson*, Walk. 87.

3. See *Tenant in Common*, 2. Slaves limited by deed, chose in action, and not reduced to possession do not survive to husband.

4. See *Bills of Exchange and Promissory Notes*, 14. Chose in action not subject to lien of a judgment.

5. See *Husband and Wife*, 8, 21, 23, 24; for what are choses in action of wife, who must sue for, and when reduced to possession.

6. See *Assignor and Assignee*, as to the right of the assignee of a judgment to sue thereon in his own name.

CIRCUIT COURT.

1. By the constitution of this state of 1833, the old county courts were abolished, and jurisdiction was given to the circuit courts for the trial of slaves. *Byrd v. State*, 1 How. 247.

2. Where the venue is changed in a criminal case, the clerk of the court need only send the papers properly belonging to the record; the original *venire* is not part of the record, unless by bill of exceptions on a writ of error; and after a change of venue, objections to the original *venire* of the grand jury will not be inquired into where no bill of exceptions was taken to it. *Ib.*

3. Special terms of the circuit court being regulated by law, the recital in the record and indictment, that the latter was found at the special term, will be sufficient. *Ib.*

4. On appeal from justice of the peace, circuit court has no other jurisdiction than justice had. *Glass v. Moss*, 1 How. 519.

5. Circuit court has power to dismiss *certiorari* improperly awarded. *Leech v. Irwing*, 2 How. 887.

6. Where, on the filing a declaration, in Warren county, against several defendants, process issued for all to the sheriff of Warren, and also a similar process for all to Hinds county, and the latter writ was returned served on all, and the former not found as to all, and the defendants appeared and filed an affidavit that they were all at the time of the institution of the suit, resident citizens of Hinds county; *held*, that the circuit court of Warren would have no jurisdiction of the case, and it should be dismissed. *Bank of Vicksburg v. Jennings*, 5 How. 425. *Aliter*, however, if one of the defendants had lived in Warren county, in which event, if the other defendants had not plead, the plaintiff might discontinue as to the defendant in Warren, and take judgment by default against the others. *Read v. Renaud*, 6 S. & M. 79.

7. The question of the necessity and propriety of directing a special term of the circuit court, is a matter entirely within the discretion of the judge; no formal order is necessary by the statute; the twenty days notice by advertisement, required by the statute, is for the information of the public, but is not necessary to confer jurisdiction; the statute is merely directory in that particular. *Friar v. State*, 3 How. 422. (Since this decision the law has been changed; a special term can only be granted where the regular term fails.)

8. See *Practice*, 37. What suits not triable at special term.

9. See *Office*, 1 and 2. For tenure of office of circuit judge.

10. The constitution of the state limits the jurisdiction of justices of the peace to cases where the principal in controversy does not exceed

fifty dollars; that of the circuit court to cases where more than fifty dollars is involved; it provides also for the right of appeal from the decision of the justices' court, without saying to what court the appeal should be taken: *Held*, that the legislature had the right to authorize the appeal to be taken to the circuit court; a writ of *certiorari* is but a mode of appeal, and the circuit court will therefore have jurisdiction of a case under fifty dollars brought by *certiorari* from a justices' court; nor will the provision of the statute, that the trial is to be had *de novo*, affect the appellate character of the case in the circuit court. *Hurd v. Germany*, 7 How. 675; *Hurd v. Tombes*, 7 How. 229; *Porter v. Deterly*, 1 S. & M. 163. After a case is thus removed into the circuit court, and a declaration is filed therein, and the pleadings made up, it is too late to move to dismiss the *certiorari*; that is only the writ which brings up the case, and errors in it are cured by appearance and plea. *Fitzpatrick v. Ray*, 4 S. & M. 645.

11. The circuit court has full jurisdiction to foreclose a mortgage without regard to amount, and has power therefore to do all things requisite for that purpose; nor can its decree be revised by the superior court of *chancery*. *Tooley v. Gridley*, 3 S. & M. 493. Same case, 1 S. & M. Ch. 518.

12. See *Slaves*, 37. Has jurisdiction of a *certiorari* from judgment of the justice, awarding costs against the owner of a slave convicted of larceny.

13. See *Probate Court*, 34. Circuit court cannot render judgment on an issue from the probate court; and if it does it is a nullity.

14. The statutes regulating proceedings in chancery, are to be applied to similar proceedings in the circuit courts; final decrees, therefore, may be entered at the same term that a bill is taken for confessed, such course being authorized by the statute, in regard to the chancery court. *Sanders v. Dowell*, 7 S. & M. 206.

15. Whether the rules of the chancery court, adopted by the chancellor, are applicable to equity causes in the circuit court? *Quære? Ib.*

16. There is no rule of the circuit court, requiring the commissioner, to whom a mortgage bill is referred, to state an account due upon the mortgage, to give notice to the opposite party of the time and place of taking it; yet, if the defendant object to a confirmation of the report for want of notice, and at the same time show any good cause for its recommitment, the report should be recommitment; but if he permit the report to be confirmed without objection, he will be held to have waived all objection to it. *Ib.*

17. If it should become necessary to file an original bill to enforce a decree for the foreclosure of a mortgage rendered by the circuit court, that court would have jurisdiction to entertain such a bill as an incident to its power to decree the foreclosure. *Tooley v. Kane*, 1 S. & M. Ch. 518.

CLERKS OF CIRCUIT COURT.

1. The official duties of a clerk of the circuit court, embrace every act that the law requires him to perform in virtue of his office; the issuance therefore of a writ of er-

ror, is an official act, and so is his taking bond, with two or more sufficient sureties, upon the issuance of such writ; and the clerk will be liable on his official bond, if he issue a writ of error with *superse-deas*, without taking from the defendant in the judgment, bond conditioned according to law, with two or more sufficient sureties; in such case, the bond may be sued on by any person injured, and recovery be had to the amount of the penalty thereof. *McNutt, Gov. v. Livingston*, 7 S. & M. 641.

2. Whether the law makes the clerk of a circuit court guarantee the sufficiency of the sureties on a bond taken by him, upon the issuance of a writ of error and *superse-deas*? *Quære? Ib.*

3. The granting of a writ of error by the clerk of a circuit court, in pursuance of the statute, H. & H. 541, is a ministerial, not a judicial act. *Ib.*

4. By law, the clerk of the circuit court may appoint deputies, but the deputy is responsible to the clerk alone; and the clerk to parties who may be injured by the acts of the deputy, as the acts of the deputy are the acts of the principal. *Ib.*

5. In an action against the clerk of the circuit court, and his sureties on his official bond for the failure of the clerk to take a bond with two or more sufficient sureties, upon the issuance by him of a writ of error and a *supersedeas*, it is no answer to the sufficiency of the declaration, to say that the erroneous conclusion of the clerk, in regard to the sufficiency of the sureties, is no breach of his bond; nor, in deciding upon the sufficiency of the declaration, is the fact that the sheriff had made a sufficient levy,

which was not discharged by the *supersedeas*, a proper subject of inquiry. *Ib.*

CLERKS OF PROBATE COURT.

1. See *Constitution of State*, 2. Can be removed only in the mode pointed out by the constitution. *Runnels v. State*, Walk. 146.

2. See *County Court*, 4, as to certificate to records of county court.

CLERK OF SUPERIOR COURT OF CHANCERY.

See *Office*, 3, 4, 5; for term and duration of office, and power to remove from, before expiration of term.

COLLATERAL SECURITY.

1. A creditor who takes collateral security for his debt, is bound to hold it impartially and justly; and if it be lost by his negligence or improper conduct, the surety on such debt may bar the creditor of so much of his demand, as he might have received from such collateral. *Payne v. Commercial Bank of Natchez*, 6 S. & M. 24.

2. L. being indebted to a bank on sundry notes as maker or indorser, on some of which notes other persons were bound as sureties for him, proposed an arrangement to the bank for their adjustment by the substitution of his individual separate note for the sum total, to be secured by confession of judgment to bind his property in Louisiana, to which proposal the

bank acceded; to be complete when proper evidence of its consummation was given to the bank; previous to this proposal, L. had deposited with the bank two hundred shares of bank stock as collateral security for the payment of these notes; L. having first sold his property in Louisiana, executed his note and confessed the judgment in favor of the bank, without notifying the bank, or the bank's ratifying it; execution issued on this judgment, and the sheriff, to whose hands it came in Louisiana, sold the bank stock for \$2200 to B., and gave B. an order on the bank for the stock, which delivered it to B.; the bank never received the proceeds of the sale of the bank stock, nor did it appear what had become of them: *Held*, in a suit by the bank on the original notes, that the parties to them were not entitled to a credit thereon for the amount of said stock, as the security of the stock had not been lost; for if the sheriff's sale changed the title, its proceeds would be within their reach; and if the sale had not changed the title, the stock would be subject to their order. *Ib.*

3. See *Mortgage*, 23; mortgage is not discharged by mortgagee taking other collateral security which proves worthless.

4. A party who receives from his debtor the note of a third person, as collateral security for his own debt, is bound to use due diligence in collecting it, and if it is lost by any delay of his, he becomes responsible for the amount; a mere delay to prosecute the collection, unaccompanied by consequent loss, will not render the creditor responsible; nor will the stay of execution for six months by a creditor on a judgment recorded on collateral

paper, unless it prove the occasion of the loss of the debt, render the creditor responsible for the amount of the collateral paper. *Steger v. Bush*, 1 S. & M. Ch. 172.

COMITY.

1. See *Contract*, 10, as to effect given to contracts and statutes made in another state.

2. See *Dower*, 3, as to whether allotted according to law of domicil.

3. In an action of debt on a judgment recovered in the state of South Carolina, plea of a discharge from the debt under an insolvent law of that state, while both plaintiff and defendant were citizens of it, will be a bar to the action. *Williams v. Guignard*, 2 How. 722.

4. See *Appearance*, 2. A judgment rendered in Alabama, on the recital, "this day came the parties, &c.," under the decision in that state, is good, and by comity may be enforced here.

5. The law of comity, except in cases of contracts, does not extend the laws of one state beyond the jurisdiction of that state. *Nations v. Alvis*, 5 S. & M. 338.

6. See *Bills of Exchange and Promissory Notes*, 184; whether order payable to bearer made in Alabama, where law prohibits a suit by the bearer, can be sued in this State by bearer?

COMMISSIONERS IN CHANCERY.

1. Commissioners in chancery have no other powers than those delegated to them by the statute which defines their duties; and that statute not giving them power to

commit a witness who refuses, when subpoenaed to appear and testify before them, but only to report his default to the court, such commitment would be illegal, and all parties engaged in making or abetting in it would be trespassers, and liable to an action for false imprisonment, by the aggrieved party. *Marsh v. Williams*, 1 How. 132.

2. See *Chancery*, tit. *Account*, and *Sale by Commissioner*.

COMMISSIONERS OF THE SINKING FUND.

By the charter of the Planters Bank of the State of Mississippi, it was provided that the surplus of the semi-annual dividends on the stock of the state, after paying the interest on the bonds of the state sold for stock, should "constitute a sinking fund under the management of the auditor, and the president and cashier of said bank, for the redemption of said bonds;" held, that these three persons were thereby constituted trustees of the fund thus established; and were authorized to loan the fund at interest, and, having made loans, could sue at law on any contract within the scope of their powers; and in such suit they must aver that they are commissioners of the sinking fund and are incumbents of the offices, the incumbents of which, the law constitutes such commissioners. *Commissioners of the Sinking Fund v. Walker*, 6 How. 143; *Montgomery v. Commissioners of Sinking Fund*, 7 How. 13.

COMMON CARRIERS.

1. The owners of steamboats en-

gaged in the carrying trade are common carriers, and liable as such; they are insurers against all losses not within the exceptions of law or which are not excepted by special contract; they may obviate the rigor of the law by inserting the proper exceptions in the bill of lading. *Gilmore v. Carman*, 1 S. & M. 279.

2. A loss occasioned by accidental fire, not arising from negligence or carelessness, is not within the exception of a loss caused by "act of God;" nor is fire one of the "dangers of the river," and will not therefore be embraced in a bill of lading by these words: "the dangers of the river only excepted." *Ib.*

3. The words "inevitable accident," when used in law to designate the mode by which a loss has happened or may happen to a common carrier, are synonymous with the phrase "the act of God." *Neal v. Saunderson*, 2 S. & M. 572.

4. In an action against a common carrier he offered to introduce witnesses to prove that the loss had been occasioned by "inevitable accident," which the court below refused to admit; *held*, that the proof should have been allowed. *Ib.*

5. Where a common carrier receives goods and gives a bill of lading without excepting "the dangers of the river," his contract is not absolute to deliver the goods at all events, but is subject to losses occasioned by act of God or the king's enemies. *Ib.*

COMMON LAW.

1. How far the common law adopted and in force in this state, and how far the English statutes prevail here, indirectly considered in the cases of *Byrd v. State*, 1

How. 163, and *Shaffer v. State*, 1 How. 238.

2. It seems that none of the English statutes are in force in this state, as part of the common law. *Wheelock v. Cozzens*, 6 How. 279.

3. The common law, as a portion of the law of the land, is recognized by the constitution of this state; but is subject to be altered or repealed at the will of the legislature. *Noonan v. The State*, 1 S. & M. 562.

4. It seems that the English statutes as far back as the 32 Hen. VIII. are not in force in this state. *Sessions v. Reynolds*, 7 S. & M. 130.

COMMONS.

1. A dedication of a piece of land to the public, as commons, need not be by deed or writing. *Vick v. The City of Vicksburg*, 1 How. 379.

2. To constitute a good dedication and right to easement in land, there must be some party beneficially interested in it, besides the grantor; it is like any other contract, though not so strictly construed; there need not necessarily be a person to hold the legal title; the dedication will be upheld in favor of the equitable or beneficial claimant; yet there must be such claimant, to constitute a valid dedication. *Ib.*

3. The rule, with reference to dedications of urban property, deducible from the authorities, is, "that, where the owners have laid it out into lots, with streets and avenues intersecting the same, and have sold lots with reference to such plat, it is too late for them to resume a general and unlimited control over the property thus ded-

icated to the public." The acts of the proprietor of such city property by which a dedication may be established, must be, either in themselves or from the relation of the parties, of an open, palpable, deliberate, and public character. The testimony to establish a dedication by implication, as by assent and user, sale at increased value, &c., must be of the same open and explicit kind, and absolutely inconsistent, according to the rules of law and the obligations of good faith, with any other supposition. *Ib.*

4. Where the owner of a tract of land, which was at the time in part a dilapidated and abandoned cotton field, and in part a wild and unsubdued forest, conceived the idea of laying it out into lots, and making it the site of a future city, his intentions, and declarations of his intentions and designs, made to private individuals, and his offer to sell to one witness, and his refusal to sell certain lots to another, while he was engaged in making a survey of the premises; and his drafting of plats of the intended town, will not, if he die before his plans are completed, and the town formally and fully laid off, and while the whole matter is subject to be altered, modified, and changed at his pleasure, constitute a dedication to the public of an easement in any portion of the property, the subject of these speculations. *Ib.*

5. Nor would the fact that the proprietor of such inchoate town, who died before completing his plans, sold one lot, at an advanced price, and in the deed described it as "lying, and being in the plat of the town of V., on the Mississippi river, near the mouth of Glass's bayou; being the corner of Water and Centre streets," constitute a

dedication of an easement to the public in the proposed town; there being in fact no persons in interest but the grantor and grantee, the town not yet laid out, no plat answering fully the description as to streets called for in the deed; the place a solitude; the grantee fully aware of the condition of things; the alleged streets not yet opened, and the whole property unoccupied; in such case, such grantee would have a mere right of way; a rural, not an urban servitude; and it would be limited to him; and he might, by his deed to the grantor, reconvey and redeliver such right to him. *Ib.*

6. Where the testator directed a certain portion of his real estate to be laid off into town lots, at the discretion of his executrix and executors; and before they had all resigned their office, and without having laid off the town, a person claiming to be the administrator, with the will annexed, but not legally so appointed, will have no power to lay out such town; and if he do so his acts will be illegal and void, and any dedication to the public made by him, irregular and inoperative. *Ib.*

7. The void acts of a stranger, in dedicating to the public the property of minors, are incapable of any recognition which could give them validity as against the owners, except such as would amount to a release on their part, or an original conveyance of the property; and where such minors, as soon as they have come of age, have asserted, through the courts, their rights, the fact that in deed executed by them they have referred to the boundaries and names given to such pretended dedications, will not affect their right. *Ib.*

CONDITIONS.

1. The non-performance of, can only be taken advantage of, by grantor and his heirs. See *Spanish Laws*, 5, 6, 7, 8. *Winn v. Cole*, Walk. 119.

2. See *Contract*, 11 and 58, as to performance of conditions precedent.

3. See *Grant*. The non-performance of conditions subsequent defeats grant, and the land reverts to the grantor.



CONSIDERATION.

1. Where the contract is by deed, the consideration need not be set forth. The law implies one, if none be stated. *Minor v. Michie*, Walk. 24.

2. A consideration is also implied upon bills of exchange and promissory notes; in all other cases, not being implied, must be stated in the declaration. *Ib.*

3. A writing, in these words, "Due D. M. nine hundred and ninety-one pounds clean cotton, on demand," is neither a deed, bill of exchange, nor promissory note, and it is necessary, in declaring upon it, to state a consideration, the omission to do which is fatal, and not cured by verdict. *Ib.*

4. How far failure of, can be taken advantage of, at law and in equity, and whether a different consideration from that contained in the deed can be established by parol. See *Evidence*, 7, 8, and 9. *Kerr v. Calvit*, Walk. 115.

5. Where the consideration, on which an instrument is given, is expressed, no other and different consideration can be alleged and proved. *Hughes v. Daniel*, Walk. 488.

6. See *Bills of Exchange and Promissory Notes*, 20; consideration must not be merely beneficial or prejudicial to one party or the other, but legal also.

7. The acknowledgment that articles had been furnished S. as executor, to finish a house which he, as executor, was finishing, is sufficient proof of consideration, to hold S. individually liable. *Sims v. Stillwell*, 3 How. 176.

8. See *Deed*, 12; sufficient consideration, payment to third party.

9. See *Contract*, 32; defence may be made to new note, of failure of consideration which existed to old note.

10. Forbearance is a good consideration to a release of error. *Barnes v. Moody*, 5 How. 636.

11. Where a contract, or instrument, does not of itself import a consideration, the one on which it is founded must be averred in the pleadings. *Willis v. Ives*, 1 S. & M. 307.

12. Correspondence in dates and amount, between a note and certificate of stock, is evidence that one was the consideration of the other. *Barringer v. Nesbit*, 1 S. & M. 22.

13. See *Bills of Exchange and Promissory Notes*, 119; where excess of power exercised in filling up blank note, constitutes failure of consideration.

14. See *Fraud*, 1st, for a case where the fraud of the vendor caused a failure of consideration.

15. See *Contract*, 41; a workman who does not do his work in a workmanlike manner, cannot recover for it.

16. See *Fraud*, 21, 22; fraud may be proved at law, and constitute failure of consideration.

17. The assignment of a bond

conditioned to make title to land, the obligor having a good title, will be a sufficient consideration for a note or bill single. *Montgomery v. Dillingham*, 3 S. & M. 647.

18. See *Surety*, 10; a mere voluntary promise to give time is a *nude pact*.

19. Where forbearance to sue is the consideration of the contract, the suit should be brought on that consideration, and not the original indebtedness. *Montgomery v. Dillingham*, 3 S. & M. 647.

20. See *Fraud*, 27; consideration of promise to pay the debt of a third person, need not be in writing.

21. C. sold P. a tract of land, and covenanted in the deed, that if title to part of it failed, he would make a corresponding deduction from the purchase-money, and gave also a covenant of warranty; *held*, that in an action to recover the purchase-money, P. could set up a failure of consideration as to the land to which the title was not perfected; and where P., before suit was brought against him for the purchase-money, sold the land to G., it was *held* to be by no means clear that C.'s covenant was a real covenant; and that if it were it depended on the terms of the assignment, whether it passed to G. *Chaplain v. Briscoe*, 5 S. & M. 198.

22. See *Personal Property*, 14, 15; how far unsoundness of article sold, failure of consideration, where no warranty nor deceit.

23. The administrators of a deceased person, at the sale of his personalty, proclaimed that the slaves about to be sold were subject to judgment liens, and offered and agreed that in case they should be seized under the judgments, the

sale should be considered as void, and the notes of the purchaser be given up; the slaves accordingly sold for their full value; in an action brought by the administrators on a note given for the purchase-money, *held*, that the maker of the note might show, under the general issue, that the slaves were taken out of his possession, and sold under the judgments, and that the consideration of the note had failed. *Buckels v. Cunningham*, 6 S. & M. 358.

24. Money paid upon an illegal consideration cannot be recovered back. *Rowan v. Adams*, 1 S. & M. Ch. 45.

25. G. G. bought slaves of N. which were introduced into this state, and sold in violation of law; and to secure the purchase-money executed a deed of trust on land, and afterwards sold the land to C. G., which was again sold under the deed of trust by N., at which sale C. G. became the purchaser, and executed his notes to N. for the purchase-money, and gave a deed of trust to secure their payment; N. attempted to sell under the deed of trust, and was enjoined by C. G. on the ground that his debt to N. was the assumption of G. G.'s debt by him; *held*, that the illegality of the consideration of the notes of G. G. did not attach to the notes given by C. G. and that N. was entitled to sell, under the deed of trust. *Gibson v. Niblett*, 1 S. & M. Ch. 278.

26. Where A. executed his note to B. in consideration of a covenant by B. to have title to a piece of land made to A. on C.'s coming of age; and C. on coming of age refused to make title to A. and to procure C.'s title, A. had to pay a large sum; *held*, in an action on the notes by B.'s assignee against

A., that A. could not plead failure of consideration of the notes ; nor plead the sum he had to pay C. for the title, as an offset. *Gridley v. Tucker*, Freem. Ch. 209.

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CONSTITUTION OF STATE.

1. See *Jurisdiction*, 2 and 3. Law permitting transfer of cases from inferior to supreme court, before final judgment constitutional. *Blanchard v. Buckholt*, Walk. 64.

2. A legislative act, in violation of constitution, is void, and it is the duty of the judges to declare it so. *Runnels v. The State*, Walk. 146.

3. The act of the legislature, abolishing the office of clerk of the probate court, and directing the judge to discharge the duties of clerk, (there being a clause in the constitution pointing out the mode in which clerks of that court shall be removed,) is unconstitutional. *Ib.*

4. Is an act of the legislature authorizing executors to sell the lands of minors in particular cases constitutional? Third persons cannot make the objection. *Coleman v. Carr*, Walk. 258.

5. See *Trustees of Poor*, 1 ; as to power of legislature to stay execution.

6. See *Surety*, 5 ; law giving right to surety, to move for money paid by him, is unconstitutional.

7. See *Limitations, Statute of*, 5 and 6 ; as to constitutionality of law repealing limitation act, where right to plead has become vested.

8. To set aside a sheriff's sale on motion is unconstitutional, in depriving a man of his property not by due course of law. *Flournoy v. Smith*, 3 How. 62.

9. The charter of the Grand Gulf

Railroad and Banking Company, which prescribes the mode of ascertaining the value of land over which the road was to pass, and provided that the court, when the value was assessed, should convey the land to the company, and give judgment and execution against the company for the amount assessed, in favor of the owner of the land, violates that clause of the constitution which declares that private property shall not be taken for public uses without compensation first made. *Thompson v. The Grand Gulf Railroad Company*, 3 How. 240.

10. Where the remedy prescribed by the legislature is unconstitutional, the courts can afford no relief ; the legislature must be looked to. *Ib.*

11. See *Slaves*, 19 ; for contract for introduction of slaves into the state in violation of constitution.

12. See *Attorney at Law*, 17 ; not unconstitutional to prohibit bank directors from being attorneys for the bank.

13. See *Banks*, 4 and 10 ; for constitutionality of the Mississippi Union Bank charter, and the pledge of the faith of the state.

14. Where portions of a law conflict with the constitution, but the residue is valid, the latter will be sustained and enforced if it can be separated from the former. *Campbell v. The Mississippi Union Bank*, 6 How. 625.

15. Under the constitution of this state, requiring the publication of a law, pledging the faith of the state for the redemption of a loan, and referring it to the next succeeding legislature, the whole law need not be published, but only such portions as are necessary to make known the objects and purposes of the loan. *Ib.*

16. See *Mechanics' Lien*, 2, 3; the mechanics' lien law of 1840, is constitutional and cognizable alone in the circuit courts.

17. See *Vice-Chancellor*, 1 and 2; for constitutionality of vice-chancery court, and the power of the legislature to authorize an incumbent to hold over until his successor was qualified.

18. See *Criminal Law*, 86; for constitutionality of gallon law.

19. The common law, though recognized by the constitution, may be altered or repealed by the legislature. *Noonan v. The State*, 1 S. & M. 562.

20. See *Board of Police*, 1; act authorizing appeals therefrom constitutional.

21. See *Slaves*, 29; act confiding trial of slaves, in order to render their masters liable for money stolen by them, to justices of the peace, is unconstitutional.

22. See *Banks*, 34 and 35; *quo warranto* act of 1843, constitutional.

CONSTITUTION OF UNITED STATES.

1. See *Criminal Law*, 4; as to how far the clause that no man shall be put twice in jeopardy of life or limb, is applicable. *State v. Moor*, Walk. 134.

2. The act of the legislature of 1825, authorizing the city of Natchez, to levy a tax or duty on steamboats and other vessels, landing at that port, is not repugnant to the 10th section of the first article of the federal constitution. That act does not profess to divest the right of property in the banks of the river, and is not therefore in conflict with the constitution. *O'Conley v. The City of Natchez*, 1 S. & M. 31.

3. See *Taxes*, 1, 2; taxes levied on sales of flat boats, are not unconstitutional.

4. See *Banks*, 26, and 27; a bank charter is a contract in the meaning of the constitution; and the act prohibiting banks from assigning their notes does not impair its obligation.

5. See *Banks* 34, 35; *quo warranto*, act of 1843, not unconstitutional.

6. The statute abolishing imprisonment for debt, and thereby discharging all obligors in bailbonds, by preventing the bail giving up their principals in discharge of themselves, is not a violation of the constitution and does not impair the obligation of the contract. *Brown v. Dillahunty*, 4 S. & M. 713.

CONTINUANCE.

1. A refusal to grant a continuance, is no ground of error. *Babcock v. Scott*, 1 How. 100; *Berry v. Hale*, 1 How. 315; yet it will be error to refuse to hear an application for one. *Marshall v. Fulgham*, 4 How. 216; *Muirhead v. Muirhead*, 6 S. & M. 451.

2. See *Imprisonment Term*, 2. Under the law of 1840, each defendant, as a matter of right, is entitled to a continuance until the term ensuing that to which he is served with process, whether there be more defendants than one or not.

3. Affidavit for a continuance of a cause, where the question of the validity of a marriage is involved, on the ground of the absence of a witness, who could prove that the woman was living previous to the alleged marriage with another man

as his wife, is insufficient; it should show that her alleged first husband was alive at the time of her inter-marriage with the second. *Muirhead v. Muirhead*, 6 S. & M. 451.

CONTRACT.

1. See *Consideration*, 1, 2, 3. Sealed instruments, bills of exchange and promissory notes import considerations; but a contract to deliver on demand a certain number of bales of cotton requires a consideration to be stated when it is declared on. *Minor v. Michie*, Walk. 24.

2. In a contract to deliver on demand onerous property, if no time or place of delivery be specified, a special demand must be averred and proved to entitle to a recovery for a breach of it. *Ib.*

3. If A. is in possession of a rumor, calculated materially to affect the price of any commodity, and purchases it without previously communicating this rumor to the vendor, the sale is fraudulent and void, both at law and in equity; fraud being equally cognizable in both. *Frazer v. Gervais*, Walk. 72. *Contra* by S. C. of U. S. in *Laidlaw v. Organ*, 2 Wheat. 178. See *Verplunckon Contracts, passim*.

4. Parol contract merged in written, and evidence to show different consideration from that stated in deed, inadmissible. See *Evidence*, 7, 8 and 9. *Kerr v. Colvit*, Walk. 115.

5. See *Real Estate*, 4; as to rescission of contract for want of title. *Gale v. Green*, Walk. 159.

6. See *Real Estate*, 5; as to rescission of contract on the ground of mutual mistake as to ownership

of land. *Harrison v. Stowers*, Walk. 165.

7. See *Chancery*, 15 and 16; as to rescission of, where grantor intended to bar rights of his wife by deed to grantee. *Dismukes v. Terry*, Walk. 197.

8. Mere mistake of law without fraud, is no ground for setting aside a contract. *Jennings v. Gibson*, Walk. 234.

9. See *Real Estate*, 7; for purchase of land where vendor no title, and vendee not evicted.

10. Contracts will be governed by the law of the state where they are made, and the construction given by a sister state to its statute, will be adopted. *Sampson v. Breed*, Walk. 267.

11. Where there was an entire contract by which A. agreed to deliver ten slaves by name, to B. at a fixed time, and B. executed his notes payable after the slaves were to be delivered; *held*, that A. could not recover upon the notes until he proved a tender of the ten slaves, a tender of nine with the statement that the tenth had run away, but would be delivered when caught, will not be sufficient. *Farrar v. Gaillard*, Walk. 269.

12. A promise, upon sufficient consideration, made to one, to pay the debt he may be owing to another, is sufficient to entitle the party to whom the promise is made to recover of the promisor. *Vigniau v. Ruffins*, Walk. 312.

13. See *Chancery*, 32; as to specific performance where the whole property contracted for cannot be had.

14. See *Husband and Wife*, 5; as to how far contract by, in this state, will be affected by contract between in Louisiana.

15. An insolvent debtor may pre-

fer one creditor to another. *Mer-
rick v. Henderson*, Walk. 485.

16. See *Consideration*, 5 ; as to where consideration expressed, if different, can be proved to deed.

17. Where A. agreed in writing, in consideration of his own note to B. for \$2,850, due first January, 1830, and also of his transfer to B. of C.'s note for \$2,350 to pay \$200, if both notes were not paid by the tenth of January, 1830, B. can only recover of A. the legal interest if the debts be not paid, and not the specific sum agreed on. *Hughes v. Fisher*, Walk. 516.

18. See *Bills of Exchange and Promissory Notes*, 20. Consideration of contract must be legal and not merely beneficial or prejudicial to either party.

19. See *Chancery*, 61 ; for specific performance of contract for personality.

20. See *Comity*, 3 ; how far discharged by insolvent law of another state.

21. See *Slaves*, 16 ; for contract in violation of law being void.

22. All contracts are joint and several in this state by statute, whether they so appear on their face or not. *Peyton v. Scott*, 2 How. 870.

23. A debtor of B. paid to B.'s wife while B. was sick a certain sum of money in bank bills ; B. died, and after his death his wife having still the same bills in possession, was sued by B.'s administrator in an action of debt for so much money had and received, for the use of B. ; *held*, that the action could not be maintained, there being no promise express or implied to uphold it. *White v. White*, 2 How. 931.

24. A. contracted with S., with

reference to certain lands of O., that S. might take possession of the lands and improve them, and if he did not wish to buy, that O. should pay S. for the improvements what two disinterested persons should say they were worth ; S. improved the lands and declined to buy, and called on O. to have the improvements appraised. O. failing to appoint an appraiser ; S. had the land appraised by two disinterested persons, and sued O. for the amount of their appraisal ; *held*, that S. had a right to recover the appraised value. *Orne v. Sullivan*, 3 How. 161.

25. See *Real Estate*, 11 ; for contract to pay for land before deed is to be executed.

26. See *Executor and Administrator*, 37 ; how far individually liable for contracts as such.

27. See *Deed*, 13 ; void for uncertain description of land.

28. See *Bills of Exchange*, 49, 50, 82 ; how far maker of a note precluded from setting up defence, where he has represented there was no defence.

29. See *Pleading*, 59 ; of contract, where it cannot be understood without extrinsic aid.

30. See *Chancery*, 85, and *Vendor and Vendee*, generally ; for rescission of contract for real estate, for fraud in vendor.

31. The obligation of a contract is the duty which the obligor is under to perform it ; a remedy being the mode of compelling the performance of that duty is therefore an essential part of the legal obligation of the contract ; no particular form of remedy is essential so there be an adequate, subsisting one ; the power of the legislature, therefore, over the remedy, is limited ; they may change it, but the power to enforce the duty must

not be weakened. *McMillan v. Sprague*, 4 How. 647.

32. Where a note of a third party is given for a slave warranted sound, and afterwards the vendee take up the note of this third party by giving his own in lieu of it, and the slave thus purchased turn out unsound, the vendee may make that defence to the second note in bar of it. *Rentfrow v. Shaw*, 4 How. 651.

33. See *Slaves*, 19. For contract of sale, after May, 1833, of slaves introduced into the state for sale.

34. See *Chancery*, 85; fraud without consequent damage, no ground for rescinding contract.

35. A simple contract is merged in a bond, both being given for same debt. *Myers v. Oglesby*, 6 How. 46.

36. A letter requesting information as to whether a creditor will take payment of his demand in a certain way, and an answer agreeing to do so, is not a *contract* to receive payment in that way. *Harper v. Calhoun*, 7 How. 203.

37. See *Sale*, 1 and 2; what facts will constitute a constructive delivery of property, and the effect of destruction of it before change of possession.

38. C. being the owner of a house which had been rented to B., showed A. the lease of B., in which B. covenanted to leave the premises in as good repair as he received them, and informed A. that B. had not left the house in good repair, as he was bound to, and that if A. was willing to make the necessary repairs, the character of which were shown to A., and look to B. for his payment, he might do so and have the benefit of the agreement of B. with C.; A. agreed to this and did the work, and B. re-

fusing to pay for it, A. sued him on the lease in the name of C., C. having full notice of the suit, and a verdict was rendered for B., because it appeared in proof on the trial that B. left the property in as good condition at the termination of the lease as it was at its commencement; *held*, that A. could recover of C. the value of the work done on the house; he must abide by his representations. *Cartwright v. Carpenter*, 7 How. 328.

39. An agreement between a defendant in an attachment suit and an attorney at law, where slaves were attached, that if the attorney succeeded in defending the suit, the defendant would transfer and convey to the attorney her right to the slave, but was not to warrant the title, and the defendant afterwards compromised the suit, and delivered all the slaves, including the one thus conveyed to the attorney, to the plaintiff, who had no notice of the agreement with the attorney; *held*, that the attorney could not maintain an action of detinue against the plaintiff for the slave; the agreement vested no present interest in him, and the attachment being a lien on all the slaves, was perfected by the sale of them to the plaintiff. *Peck v. Webster*, 7 How. 658.

40. A contract must be governed by the law of the place where it is to be performed. *Martin v. Martin*, 1 S. & M. 176.

41. Every workman who contracts to do a piece of work, thereby impliedly warrants that he will bring sufficient skill and dexterity to its performance, to complete it in a just and workmanlike manner; and if he do not do it in that manner, he will not be entitled to recover. *Leflore v. Justice*, 1 S. & M. 381.

42. A person who has accepted an order to pay a certain sum out of moneys he may collect on claims in his hands, and who collects on those claims the currency of the state, which afterwards depreciates, cannot escape the payment of his acceptance by a tender to pay the funds he had collected; the holder is entitled to good money. *Van Vacter v. Brewster*, 1 S. & M. 400.

43. See *Banks*, 21 and 22; the maker of a note payable to a bank which has assigned it cannot set up as a defence, that the notes of the bank were not at par when the debt matured.

44. See *Vendor and Vendee*, 11; for such defects and fraud as will entitle to rescission of contract.

45. Where cotton was delivered in part payment of a note, in the absence of proof as to the price agreed on, the market value of the cotton at the place of delivery may be proved; *aliter*, if there had been a special contract. *Phillips v. Commercial Bank of Manchester*, 1 S. & M. 636.

46. R. contracted with M. to act as overseer for him for one year, for three hundred dollars a year; M. died before the expiration of the year, but R. continued to act as overseer, till the year had expired, and sued M.'s administrator for the year's wages; *held*, that he was entitled to recover for the whole year. *Hill v. Robeson*, 2 S. & M. 541.

47. An agreement between the vendor and the vendee of land, that if the vendee should fail to pay the notes given for the purchase-money at maturity, he should pay the vendor rent at a certain price and interest on the notes; and the vendor, in case he was compelled to take the land back, should allow

the vendee for improvements, does not exonerate the vendee from his obligation to take the land, if the vendor insist on it, and the latter may sue him for and recover the purchase-money. *Beaty v. Harkey*, 2 S. & M. 563.

48. If parties enter into a special contract by which one agrees to do certain labor and furnish certain materials, and the other agrees to pay a certain sum, the laborer cannot abandon the work before it is completed and recover for what he has done, in *indebitatus assumpsit*; if, however, the party who abandons the contract have furnished lumber, which is afterwards used by the other party, he can recover the value of the lumber used. *Wooten v. Read*, 2 S. & M. 585.

49. See *Tax Collector*, 5. A repeal of a law cannot affect a bond executed under that law previously.

50. See *Consideration*, 17; re-assignment of a bond for title, good consideration.

51. See *Vendor and Vendee*, 21, and for right of rescission where bond for title is given, on account of want of title, and see vendor and vendee for rescission of contract generally, for want of title.

52. In an action against an unincorporated banking company a certificate of the agent of the association, that "M. had deposited with him four hundred and thirty dollars, in tickets, on deposit, subject to him only, on the return of the certificate," imports on its face no liability against the company. *Lake v. Munford*, 4 S. & M. 312.

53. An unincorporated banking company was formed in 1838, and issued a large amount of tickets; under a privilege in the articles of association, for the admission of new members, L. and M. in 1839

became members of the association; *held*, that they were not liable for the tickets issued in the previous year. *Ib.*

54. Where an association to bank, has dissolved its connection, and appointed commissioners to wind up, neither they nor their agents have any authority to bind the members of the association by any new undertaking. *Ib.*

55. See *Assumpsit*, 16; when special count on contract may be abandoned and resort had to common counts; and when a party, who has paid part and contracted to pay the rest of the cost of an article on its delivery, can recover back what he has paid.

56. See *Bail*, 2; a bail bond is no longer obligatory after the statute has taken away the right of the bail to deliver up his principal; and that statute does not impair the obligation of the contract.

57. See *Consideration*, 21; whether a covenant to deduct from the purchase-money of land, if the title fail, is a real covenant, and passes with the land; and whether the purchaser, when sued for the purchase-money, may not set up a failure of consideration to the extent of failure of title.

58. He who wishes to avail himself of a contract containing conditions precedent on his part, to be performed, must in pleading plead performance of them, and in making proof, prove it. H. executed a deed of trust on certain slaves and other property, to F. as trustee, to secure E. in the payment of certain notes due him by H. After the execution of the notes and deed of trust, H. & E. had an agreement, by which they arranged the terms of the settlement of the note; part of these terms was, that

H., by a day named, was to deliver up to E. the slaves named in the deed of trust; at the end of the agreement was this clause: "Whenever the above stipulations of compromise are complied with, it is to be a full settlement of all debts and demands of either party against the other, and a full release either at law or in equity." H. having failed to deliver the negroes to E. as stipulated, F., the trustee, brought an action of replevin against J. H., who had one of the slaves in his possession, for it; the court below instructed the jury that the agreement of compromise changed the title from F. to E. who alone could recover; *held*, that the instruction was erroneous; that no part of the agreement went into effect until H. had performed his condition precedent of delivering the slaves to E. *Fultz v. House*, 6 S. & M. 404.

59. The Commercial Bank of Manchester lent to C. & M. \$12-000, for which they were to ship cotton to the merchants of the bank, to be shipped to Liverpool and sold for account of C. & M., and the proceeds to be credited on the note of C. & M. for the sum lent; C. & M. shipped two hundred bales of cotton, which were sent to Liverpool, and for which the bank credited C. & M.'s note with \$6711 39, as the proceeds of sale; they, not being satisfied with the credit thus given, it was *held*, that they had a right to show, by way of increasing the off-set, the quality of the crop of cotton of that year, the usual weight of the bales, and the average price at Liverpool about the time the sale took place; the account of sales rendered by the English house (to which the cotton

was shipped) to the bank would not be evidence in itself; the deposition of some one acquainted with the transaction would be requisite to establish its truth, and thus make it admissible; nor, in such case, would the defendant be authorized to show that the notes of the bank were, at and near the time of the maturity of the note, at a discount in New Orleans, by way of increasing the amount of off-set; if any such inquiry be instituted, into the value of the money loaned, it must be confined to the time of the loan, and the place where it occurred; if the notes were at par value, at the time of the loan, and the bank be by the contract liable for the difference of exchange, the measure of her liability would be the premium between par and exchange on Liverpool, at the time of the sale of the cotton; if the notes were below par when they were paid out by the bank, then the amount of discount on them, must be added to that premium, so as to make them equivalent to par funds when they were paid out. *Commercial Bank of Manchester v. Chisholm*, 6 S. & M. 457.

60. In this country a contract for overseer's wages is not an entire contract by the year, nor regulated by the strict law of contracts, and although an overseer may contract for a year, and may be turned off for misconduct, or leave voluntarily before the year expires, he is, notwithstanding, entitled to recover for the time he conducted himself properly; he cannot, however, put another in, instead of himself, though equal to him in capacity, without the consent of his employer; where, therefore, H. engaged S. as an overseer, for a year, at \$650, and be-

fore the year expired, S. left without the knowledge or consent of H., though he employed a substitute, who during the absence of S. conducted the business of H. equally as well as S. could have done, and S. sued H. for his full wages, and the jury returned a verdict in favor of S. for the whole sum claimed, with interest; held, that the verdict was excessive, and a new trial should have been granted. *Hariston v. Sale*, 6 S. & M. 634.

61. Where a bond was payable on its face to B., it seems it is a matter of doubt whether it would be admissible in a court of law to prove that the obligation did not originally belong to B., but to a bank. *Lanier v. Trigg*, 6 S. & M. 641.

62. P. entered into a contract with the Jackson & Brandon Railroad & Bridge Company, by which he agreed to build a bridge over Pearl River, and to construct a turnpike-road from the eastern end of the bridge to the termination of the swamp, in an eastwardly direction; and the company agreed to pay him \$37,500 for the bridge over the river, forty-four cents per cubic yard for making the embankment for the turnpike, and ten dollars per lineal foot for building all necessary bridges; afterwards P. entered into a contract with the Mississippi & Alabama Railroad Company, to which the Bridge Company were also parties, by which he agreed to construct a railroad, furnish material, &c., from Jackson to Brandon, and the railroad company agreed to pay him therefor \$204,000, and an extra sum for excavating rock. In the last contract there was a clause declaring that the bridge company

had abandoned their scheme, and that they thereby assigned to the railroad company all their rights and privileges under the first contract with P., but in the last contract it was expressly stipulated that the building of a bridge over Pearl River should not be included in P.'s obligations to the railroad company; *held*, that the two contracts must be construed together, and that P. was entitled to receive from the railroad company the \$37,500, forty-four cents per cubic yard for making the embankment, and ten dollars per lineal foot for building bridges, in addition to the \$204,000 and the extra sum for excavating rock. *Petrie v. Wright*, 6 S. & M. 647.

63. Corporations may contract under their corporate seal, by a vote of the directory entered on the books of the corporation, or by their agents acting within the scope of their authority; and binding contracts may be implied from their corporate acts, without either a vote, deed or writing. *Ib.*

64. W. P. contracted with the Mississippi & Alabama Railroad Company to build a railroad, furnish materials, an engine, &c., for which the company were to pay him a stipulated sum, a portion of which was to be advanced to enable him to purchase slaves to work on the road; and he was to execute to the company a mortgage on the slaves so purchased, as a security for the diligent and faithful performance of his duties; they advanced the money and he purchased the slaves and executed the mortgage; the company afterwards, and before the road was completed, adopted several resolutions; by the first of which they released W. P. from his obligation to furnish an

engine; by the second they directed his mortgage to be cancelled; and by the third, after admitting in the preamble that they had failed to supply him with par funds, they requested that he should proceed to finish the road at his own expense, and retain it until he should be repaid by the profits; they subsequently agreed that F. H. P. should be substituted as a contractor in the place of W. P., and that they would give him \$15,000 to complete the road; W. P., at the same time, gave to the company his verbal promise that F. H. P. should finish the road; F. H. P. then, with the knowledge of the company, proceeded to work on the road, and continued to work on it for some time, though he never finished it; *held*, that the resolutions, by substituting new terms and conditions inconsistent with the original agreement, amounted to an abandonment of the contract with W. P., and when taken in connection with the other circumstances and facts in the case, were a settlement of the balances between W. P. and the company; and a discharge of him from all obligations on account of his contract or mortgage. *Ib.*

65. P. contracted with the Mississippi & Alabama Railroad Company to build a railroad from Jackson to Brandon, for which he was to receive about \$281,000, to be paid from time to time, as P. in the construction of the road might, in his own opinion, require it. The company failed to keep him supplied with par funds, and after paying him \$298,026, most of which was in depreciated bank paper, they released him from the further prosecution of the road, and cancelled the mortgage he had

given them for the diligent and faithful performance of the work on the road; when this release was given and mortgage cancelled, P. claimed large damages against the company for their failure to comply with their contract; they refused to allow him the whole amount claimed, but they allowed him a part of it, and a final settlement took place between them. P. in his answer stated, and several witnesses proved, that the settlement was fair and made in good faith; *held*, that even though P. may have received more than he was strictly entitled to, the settlement was a valid one, not only as to the company, but also as to creditors of it. *Ib.*

66. If conditions, which are impossible or insensible, be annexed to a contract, they are inoperative and void, and the obligation of the contract remains absolute, if it be not for the doing of an illegal thing; but, if any sense or certainty can be made of the conditions, the whole shall stand; B. deposited \$1235 with M., in trust, to be returned whenever, within two years thereafter, B. would make, before any tribunal having competent jurisdiction, good and sufficient proof, satisfactory to the administrator of E., of the payment by B, on a day named, to E. or his duly authorized agent, of the sum of \$950; to be applied on certain payments to be made by B. to L., in pursuance of a certain agreement between B. & L., whether such payment was made by a note or in cash; *held*, in an action by B. against M. to recover back the \$1235, that the conditions, so far as they relate to the manner of making the proof and its sufficiency, are inoperative, and that B.

was entitled to recover if he could prove the payment of the \$950 to E. or his agent, without having made the preliminary proof to a tribunal or to E.'s administrator. *Merrill v. Bell*, 6 S. & M. 730.

67. A court of equity will never rescind a contract, unless the parties can be put *in statu quo*. *Pintard v. Martin*, 1 S. & M. Ch. 126.

68. See *Slaves*, 19; for illegal contract for the introduction of slaves, and how far a court of equity will lend its aid to effect a rescission of such contract, and on what terms.

69. A contract to sell "five sections of land claimed by the vendor as the assignee of certain Choctaw Indians, who claim by virtue of the fourteenth article of the treaty made between the Choctaw tribe and the United States at Dancing Rabbit creek," without describing the locality or boundary of the sections, and when it appeared by the contract, the vendor claimed to own, as assignee, thirty sections under the same title, is void for uncertainty, and a note given in consideration thereof is not obligatory; and parol proof is inadmissible to supply the omission. *Wilkinson v. Davis*, Freem. Ch. 53.

70. See *Vendor and Vendee*, 43; what circumstances take case out of statute of frauds; and see *Vendor and Vendee*, 42-47, for rescission of contract.

71. If on account of a contract between A. and B., A. gives his note to C., who was a creditor of B.; A. cannot be relieved from the payment of his note, because of a fraud committed by B. in the contract with A. *Williamson v. Raney*, Freem. Ch. 112.

72. Where a person, holding a

deed of trust on land and negroes, voluntarily agreed to wait for the collection of the debt due to him, till the debtors could make it out of the annual crops; *held*, that the agreement was without consideration and could be disregarded by the creditor at his will; and that were it otherwise, such agreement resting in parol, could not explain away or change the contract set forth in the deed of trust. *Newman v. Meek*, Freem. Ch. 441.

73. To discharge one party to a contract, on the ground of the failure of the other to perform his part, such failure must be clearly established by full, direct and satisfactory evidence. *Wright v. Petrie*, 1 S. & M. Ch. 282.

74. P. contracted to build a railroad for the Brandon Bank, at a stipulated price, and receiving money from the bank for that purpose, executed a mortgage to secure its proper application. P. abandoned the work before its completion, and while the bank was in advance of money to P.; the bank being in embarrassed and failing circumstances, without valid consideration, voluntarily released the mortgage, and discharged P. from the debt; *held*, that the release of the mortgage and discharge of the debt were fraudulent and void, as to the judgment creditors of the bank. *Ib.*

75. In forming an estimate of the damages sustained by one party, for the failure of the other to perform a contract between them, the possible profits of the one, or the amount possibly saved to the other, is not the proper *criterion*. *Ib.*

76. P. being about to construct a railroad for an incorporated company, which was to make advances of money for that purpose, executed a mortgage to the company, to

indemnify them against any loss by reason of his failure to comply with his contract; P. at a time when the company were largely in advance to him beyond the amount expended, abandoned his contract; *held*, that as to the sum so in advance by the company, the damages sustained by them would be considered as liquidated, and so far the mortgage and damages would be subject in equity to a judgment creditor of the company, seeking to subject them as equitable assets. *Ib.*

77. In a contract between a company and an individual, wherein the latter agreed to build a railroad for the former, and the former agreed to pay the latter in instalments, as the work progressed; *held*, that the latter would be entitled to recover a ratable portion of the money, for the ratable performance of the work. *Ib.*

78. Where one party abandons a contract with the consent of the other, which he has undertaken, that consent would bind the other to pay for that portion of the contract actually accomplished. *Ib.*

COPARCENERS.

Where coparceners sue at law for the use and occupation of their ancestor's land, they must all unite in the suit. *Carmichael v. Hunter*, 4 How. 308.

CORONER.

1. In an action against a coroner on his bond, for a failure to make the money on an execution directed to him, his reception of the process and return thereon estop him from denying his author-

ity, though it do not appear that the sheriff was interested and his office vacant. *Longacre v. The State*, 2 How. 637.

2. See *Sheriff*, 28; service by coroner will be presumed to have been proved in the court below, if his return be regular.

CORPORATION.

1. See *Evidence*, 59, 60; how far books of, evidence; and how far action may be maintained on original subscription for stock.

2. A failure of corporators to meet according to their charter, does not work a forfeiture thereof; nor does a failure to elect officers at the stated times; the old officers hold until the new are elected. *Smith v. Natchez Steamboat Co.* 1 How. 479.

3. Corporations under the general issue are by the common law bound to prove their corporate character; nor need the defendant make the objection of want of corporate authority by plea in abatement, as that would be but the plea of *nul tiel corporation*, which is bad as amounting to the general issue. *Carmichael v. Trustees of School Lands*, 3 How. 84. Since the act of 1836, a corporation suing need not prove its corporate character under the general issue; it is otherwise, however, if the plea of general issue be verified by affidavit denying the corporate character of the plaintiff, in which event the corporation must prove its authority. *Vicksburg & Water Works & Banking Co. v. Washington*, 1 S. & M. 536.

4. Trustees of school-lands are *quasi* corporations, and bound by

the same rule, to prove their character under the general issue. *Id.*

5. The act of the legislature of 1836, which declares that all pleas to the action shall be deemed and adjudged as admitting the parties and the character of the parties suing, &c., applies to corporations. *Reed v. The Benton & Manchester Railroad Company*, 4 How. 257.

6. See *Trustees of School Lands*, 2; for power of corporations to sue its own members.

7. A corporation is subject to the constitution and general laws of the land in force at the time of its creation, and applicable to its condition precisely as a natural person, except so far as its character has conferred exemptions or imposed restrictions. *Commercial Bank of Manchester v. Nolan*, 7 How. 508.

8. See *Usury*, 9-15; for its effect on contract by corporation; and for the consequence of a corporation exceeding its power in a contract.

9. See *Banks*, 30; corporation, by confirming acts of its agent, makes them binding.

10. See *Banks*, 68; how corporation may contract.

11. See *Will*, 31-44; for power and duty of a corporate body, clothed with trusts under a will, to carry those trusts into execution, and who may object to a want of power in the corporation to do so.

See *Banks*, for *Corporation*, *passim*.

COSTS.

1. See *Evidence*, 204. Liability for costs will not disqualify prosecutor, as witness. *State v. Blennerhasset*. Walk. 7.

2. See *Slander*, 1. As to costs in, where damages not exceed ten dollars. *Gayden v. Bates*, Walk. 209.

3. It is doubtful, whether after a final judgment there can be a re-taxation of costs, as it is the duty of the party to see that the costs entered on the fee-book are of the proper charge; but after such judgment has been extinguished by forfeiture of a forthcoming bond, the execution will not be quashed on the ground of exorbitant costs charged. *Clark v. Anderson*, 2 How. 852.

4. The assignee of an unfounded or falsely represented claim may recover of the assignor the cost expended in its prosecution. *Cartwright v. Carpenter*, 7 How. 328.

5. The plaintiff, in an action at law, who obtains a judgment, and the appellant in the high court of errors and appeals, who reverses a judgment obtained against him in the court below, are each liable for the costs incurred in the respective courts, in prosecuting the claims, and when the costs are not made out of the defendants, the clerk may, on taxing the costs against the plaintiff, issue an execution against him therefor; the bill of costs, as taxed, having the authority of a judgment. *Officers of Court v. Fisk*, 7 How. 403.

6. The clerk is entitled to his costs for recording the final record of a cause. *Id.*

7. The awarding of costs by the probate court, is a matter within the sound discretion of that court, and will not be reviewed on error by the high court. *White v. Littlefield*, 7 How. 406.

8. Where a case is dismissed by the high court for the want of jurisdiction, no judgment for costs can

be given; the party who brings the case into the court would be liable to the officers in another form for their fees and costs. *Green v. Whiting*, 1 S. & M. 579.

9. Where, on motion of the clerk and sheriff, a rule was granted against the plaintiff to give security for costs, it was not given, yet the cause was tried, and judgment rendered for plaintiff; it was held, too late after judgment for the defendant to complain that the security was not given. *Grimball v. The Mississippi and Alabama Railroad Co.* 3 S. & M. 38.

10. See *New Trial*, 99. New trial on payment of costs in ninety days, is a new trial absolute, and the other must resort to legal measures to recover costs.

11. Where the proceedings and process are wholly void, no costs can be collected from the defendant; as where the probate court issues process to take property of the intestate out of the possession of the administrator. *Wingate v. Wallis*, 5 S. & M. 249.

12. If the maker of a note, payable at a particular place, prove that he was ready at maturity at that place to pay, he will be exonerated from costs. *Cook v. Martin*, 5 S. & M. 379.

13. A party at whose instance a rule for security for costs is granted, may lose his right to have it made absolute, by want of action upon it, or by his own waiver of the right; if, therefore, the party at whose instance such a rule has been asked, apply to have it dismissed before it is made absolute, it is error to strike the case from the docket, because the rule has not been complied with. *Mississippi and Alabama Railroad Co. v. Ballard*, 5 S. & M. 606.

14. See *Assumpsit*, 17. An action in assumpsit is not intended by the words "action on the case," in the statute limiting the costs to the amount of the judgment, where the latter does not exceed ten dollars.

15. See *Attachment*, 46. Plaintiff is not obliged to give security for costs, unless the surety in the attachment bond is insufficient.

16. Where a rule for security for costs has been allowed in the court below, and the record does not show that any motion to dismiss was made below for want of security, nor that the security required by the rule, was not given, and the cause progressed to judgment after the rule was taken; *held*, that the high court of errors and appeals would not disturb the judgment. *Bullard v. Dorsey*, 7 S. & M. 9.

COUNTY COURTS.

1. See *Roads*, 3 and 4; as to their jurisdiction and power in laying out roads. *Stockett v. Nicholson*, Walk. 75.

2. The proceedings of county courts cannot be established by *parol*; they must be recorded and proved by the record. *Ib.*

3. See *Circuit Court*, 1; as to jurisdiction on abolishment of county courts.

4. Probate clerk is the proper officer to certify all records of the old county court, whether civil or criminal. *Byrd v. State*, 1 How. 247.

COURT OF CHANCERY, (SUPERIOR.)

By the constitution of Missis-

sippi, "a separate superior court of chancery," is created with full jurisdiction in all matters of equity; it is provided that "the chancellor shall be elected by the qualified electors of the whole state for the term of six years, and shall be at least thirty years old at the time of his election;" the legislature afterwards passed a law providing for the appointment of a special chancellor, by selection of the parties litigant, or by lot, if they could not agree, to sit in the trial of any case, where the chancellor from interest or other cause was disqualified from trying the case: *Held*, that the act of the legislature was not unconstitutional. *Montgomery v. Commercial Bank of Rodney*, 1 S. & M. Ch. 632.

COVENANT.

1. Where an action of covenant was brought on an agreement to deliver so many pounds of ginned cotton, a plea of payment or set-off could not be introduced, and the party defendant would have to apply to a court of equity to have his payment allowed. *Barnes v. Lloyd*, 1 How. 584.

2. A court of equity would have jurisdiction of a bill to enjoin a suit at law, on a covenant to deliver so many pounds of ginned cotton, when the covenant was discharged by a subsequent *parol* agreement to accept a certain sum of money, in satisfaction of the covenant, and payment of part of it. In such case, accord and satisfaction could not be plead at law, because the satisfaction was not complete. *Ib.*

3. See *Real Estate*, 11-13, and 50; for construction of mutual

and independent covenants to pay for land and make title.

4. See *Damages*, 6; when damages agreed on for non-performance of covenant, is mere penalty or liquidated damages.

5. See *Real Estate*, 39; for construction of mutual and dependent covenants.

6. See *Deed*, 41; for interpretation of words *grant*, *bargain* and *sale*, in a deed containing express covenants of warranty.

7. See *Real Estate*; for covenants real, running with land.

8. See *Consideration*, 26. A claim growing out of a breach of covenant, not subject of set-off.

CRIMINAL COURT.

The act of the legislature, establishing a criminal court for a certain district in the state, the jurisdiction of which was limited to the trial of criminals, from which cases might be removed by *certiorari* to the circuit court; and from which a writ of error or appeal lay directly to the high court of errors and appeals, is constitutional; such court is an inferior court, in the sense of the constitution. *Thomas v. The State*, 5 How. 20.

CRIMINAL LAW.

a. *Burglary*.

b. *General Principles*.

c. *Indictment*.

d. *Jury*; and herein of the grand jury, the empannelling and challenge of.

e. *Larceny*.

f. *Murder*.

g. *Perjury*.

h. *Trial*; and herein of trial a second time for same offence.

a. *Burglary*.

1. It will not be error to refuse to charge the jury "that if, at the time of committing the burglary laid in the indictment, there was light enough to discern a man's face, it was not burglary;" it might have been moonlight. *Thomas v. The State*, 5 How. 20.

b. *General Principles*.

2. A prosecutor in indictment is not compelled to elect between civil suit and prosecution; is competent witness for prosecution. See *Prosecutor*, 1; and *Assault and Battery*, 1, 2. *State v. Blennerhasset*, Walk. 7.

3. Defendants, separately indicted for same assault, may be tried jointly though they demand a separate trial. *Ib*.

4. See *New Trial*, 1, 2; withdrawal of witness of the state before his examination, if not subpoenaed by defendant, no ground for new trial; nor is fine, however large, assessed by jury, unless it be so large as to evince corruption in the jury. *Ib*.

5. The judge of the criminal court may reexamine the causes of commitment, and remand or discharge the prisoner, according to his own belief of his innocence or guilt. *State v. Doty*, Walk. 230.

6. See *Libel*, 1, 2.

7. In criminal cases the writ of error to the supreme court will not operate as a *supersedeas*, unless the accused enter into recognizance. *State v. Craft*, Walk. 537.

8. A prisoner is not entitled to his discharge, for not having been indicted within the two first terms of the court after his commitment for the offence charged, if both those terms failed to be holden; and even if the prisoner were en-

titled to his discharge from custody, he might still be indicted and tried for the same offence afterward. *Byrd v. The State*, 1 How. 163.

9. In a trial on an indictment of an accessory before the fact, for murder, the record of the conviction of the principal, who was a slave, by a court which by law had general jurisdiction in the punishment of slaves, though limited in other respects, is competent testimony; such record showing a regular conviction. *Ib.*

10. In order to reverse the decision of the inferior court on a motion for a change of venue, exception should be taken thereto, and the affidavit and motion spread upon the record. *Ib.*

11. The return of the sheriff that he "served a true copy of the indictment, *venire facias*, and *venire*, on the prisoner," is sufficient evidence that the panel was served on the prisoner. *Shaffer v. State*, 1 How. 242.

12. A prisoner indicted for a capital crime, who does not offer any evidence in his behalf, is not thereby entitled to the opening and conclusion of the argument. *Byrd v. The State*, 1 How. 247.

13. When all the preliminaries to a trial in a state prosecution, have been prepared by the district attorney, he may withdraw from the prosecution, and surrender it up to other persons to conduct it for the state. *Ib.*

14. See *Circuit Court*, 1; as to jurisdiction over slaves for criminal offences.

15. See *Circuit Court*, 2, 3, and *Venue*, 3; as to objections that can be taken on change of venue to original panel of grand jury, and effect of change of venue.

16. See *Evidence*, 40; as to how far confessions under fear and threats, admissible.

17. The plea of not guilty, in a criminal case, admits the jurisdiction of the court. *Byrd v. The State*, 1 How. 163.

18. The practising medicine, without a license from the board of medical censors, is no offence against the laws of this state; as that office being held during good behavior by the law of 1817, was abolished by the constitution of this state, which provides that all offices shall have a limited tenure, and no provision was made for that board. *Bryant v. The State*, 1 How. 351.

19. Where the *venire* required the sheriff to summon the jury from his county, it was held to be equivalent to of his county. *Woodside v. The State*, 2 How. 655.

20. The return of the sheriff, that he has furnished the prisoner with a list of the *venire* summoned, is *conclusive* evidence of the fact. *Ib.*

21. The admissions of the dying declarations of deceased, is not a violation of the constitution which entitles the prisoner to be confronted with the witnesses. *Ib.*

22. If a prisoner be found guilty and sentenced to be hung, and before the sentence be carried into execution, errors occur in proceedings in court, in the case, they will not affect the previous sentence of death. *Ib.*

23. No one can excuse himself from the operation of a penal statute, by showing that he acted as agent of another. *Kliffeld v. State*, 4 How. 304.

24. The legislature may constitutionally pass a law prohibiting the

sale of vinous or spirituous liquors, in less quantities than one quart; they are the peculiar judges of what will conduce to the morals and public good of the state. *Noe v. State*, 4 How. 330.

25. A subsequent statute declaring a punishment for offences, different from that of the former statute, and repealing that former statute, amounts to a pardon of all offences committed under the old law; but if the new law expressly provide that it shall not affect any cases subject to punishment under the old law, it will not operate a pardon of such offences. *Oliver v. State*, 5 How. 14.

26. Where a person was convicted of larceny committed, according to the allegations of the indictment, since the law of 1839, establishing the penitentiary code, and the judge below passed sentence on him, under the old law; *held*, that this court would reverse the judgment and pass the proper sentence upon him. *Ib.*

27. Where a judge, who was once engaged, as counsel for the state against the prisoner, is about to pass judgment on the prisoner, though he did not preside at his trial, and the prisoner's counsel challenge the judge's right to sit in the case and give judgment, and he disregards the challenge and gives judgment, it will not be error. *Thomas v. State*, 5 How. 20.

28. The plea of *non identity*, is never allowed, except in cases where the prisoner has escaped after verdict and before judgment, or after judgment and before execution; if the record do not, therefore, show an escape, such plea will be treated as a nullity. *Ib.*

29. Where a statute makes different grades of the same offence, a

verdict of *guilty* will be erroneous, unless the jury state the grade of the offence of which they find him guilty. *Ib.*

30. The foreman of the grand jury may be marked on the indictment as prosecutor. *King v. The State*, 5 How. 730.

31. It is not necessary that the grand jury should return, with the indictment, the names of the witnesses examined, or the evidence, nor need it appear of record that the witnesses before the grand jury were sworn; it will be presumed that they were. *Ib.*

32. The sheriff, as one of the officers of court, is competent to serve the prisoner with a copy of the venire and indictment. *Friar v. State*, 3 How. 422.

33. Where a man was convicted of stealing a negro, the affidavit of a third person that the prosecutor had declared that there was in existence a bill of sale of the slave, establishing title in the prisoner, is not sufficient ground for a new trial, unless the affidavit be supported by the oath of the prisoner shewing cause why the bill of sale was not produced on the trial, and stating that it could be produced at the next trial. *Ib.*

34. If the prisoner go to trial without a copy of the indictment and venire being served two entire days before the trial, he waives his privilege of such service. *Loper v. State*, 3 How. 429.

35. Where a prisoner in custody makes confessions, without any compulsion, or promise of advantage, they are evidence against him. *Peter v. The State*, 3 How. 433.

36. Where the appellate court quashes an indictment for want of form, the indictment will be con-

sidered sufficient *prima facie* evidence of guilt to remand the prisoner. *Ib.*

37. Where a bench warrant is issued in term time, returnable at the term at which it was issued, the sheriff may take a recognizance returnable to a particular day of the term, under the statute which authorized the sheriff to take a recognizance in vacation, in certain cases, unless the process was made returnable forthwith. *Moss v. The State*, 6 How. 298. The amount of the security in such recognizance is left to the sheriff's discretion. *McEwin v. The State*, 3 S. & M. 120.

38. Where a defendant is recognized to appear at a particular day of a particular term, a forfeiture cannot be taken at a subsequent term, without notice to the party that the forfeiture will be applied for; it seems it will be otherwise if the recognizance is general, to appear from term to term. *Ib.*

39. The statute of this state, authorizing the parties to select a member of the bar to sit in civil cases, when the presiding judge has been interested in the cause, does not apply to criminal prosecutions. *Peter v. The State*, 6 How. 326.

40. That clause of the constitution which allows bail in all except capital cases, before conviction, does not inhibit the grant of bail after conviction; the circuit court has the power in all offences, except those where death is the punishment, to grant bail after conviction, for the appearance of the prisoner, to abide the sentence of the court. *Davis v. The State*, 6 How. 399.

41. The act of the legislature of 1842, regulating the mode of obtaining license to sell vinous and

spirituous liquors, and prescribing the terms of the license, and the penalty of a violation of law, is constitutional. *Noonan v. The State*, 1 S. & M. 562.

42. See *Evidence*, 129, 130, for what averments and proof necessary, under indictments, for sale of liquor without license.

43. See *Evidence*, 131, for what evidence is admissible, under plea of *autre fois acquit* or *convict*.

44. The mayor of the city of Vicksburg is authorized, by the charter, to recognize prisoners to appear at the circuit court, to answer for offences with which they stand charged. *Dean v. The State*, 2 S. & M. 200.

45. A recognizance, requiring the prisoner to appear before the "judge of the court," to which it is returnable, is good. *Ib.*

46. A recognizance, reciting that the offence of larceny, with which the prisoner was charged, was committed in a county different from that to the circuit court of which, he is recognized, is not invalid thereby; the recognizance must set forth the cause for which it was taken, but need not specifically describe the circumstances of the offence. *Ib.*

47. Where the principal in a recognizance, was recognized in the sum of seven hundred and fifty dollars, and the surety in a like sum of seven hundred and fifty, it is error for the court to render a joint judgment against principal and surety for fifteen hundred dollars. *Ib.*

48. The statute, which gives the accused a right to examine the indictment "at least two entire days before the trial," intends thereby two entire judicial days; in computing, therefore, the two days, the fraction of the day of its service

must be excluded. *Nixon v. The State*, 2 S. & M. 497.

49. After indictment for retailing spirituous liquors in less quantities than one gallon, the punishment for which was by imprisonment, as well as fine, a *capias* is the proper process. *McEwin v. The State*, 3 S. & M. 120.

50. Where the record shows that the jury who convicted the prisoner were summoned by a sheriff, it will not vitiate the verdict, that the court below dismissed the sheriff from that duty. *Kelly v. The State*, 3 S. & M. 518.

51. Where a slave is killed by his master and overseer, or either, in inflicting chastisement upon him, the rules of common law, applicable to murder, will regulate the offence. *Ib.*

52. By statute of this state the master may be indicted for a cruel or unusual battery on his own slave; and whether the punishment be cruel and unusual is for the jury. *Ib.*

53. Mere intoxication is no extenuation or excuse for crime, in law; though the jury may consider it, on the question of intention or malice on the part of the defendant. *Ib.*

54. The fact that motions to quash the *venire facias*, and for an *alias venire facias*, were made and overruled in the absence of the prisoner, will not affect a verdict against him; they might have been overruled on account of his absence. *Ib.*

55. In criminal prosecutions the offence must be proved to have been committed in the county, as charged in the indictment, in order to bring it within the jurisdiction of the court. *Vaughan v. The State*, 3 S. & M. 553.

56. Where an indictment charges a shooting with a felonious intent, it must be proved that the gun was so loaded as to be capable of doing the mischief alleged to be intended. *Ib.*

57. Upon the general allegation of conviction of a penal offence, the indictment is, that it was as principal, the person charged was convicted. *Dowell v. Boyd*, 3 S. & M. 592.

58. In criminal prosecutions, after verdict and judgment of acquittal, neither a new trial nor a writ of error, can be granted to the state, unless the acquittal be on the ground of variance between the proof and indictment. *The State v. Anderson*, 3 S. & M. 751.

59. The omission to state, in the minutes of the court, the character of the offence charged in the indictment, is immaterial, as the whole record must be taken together. *Goodwyn v. The State*, 4 S. & M. 520.

60. If the indictment charge the death to have happened by a leaden bullet, discharged from a shot gun, and the proof be that it happened from buck shot, it will be a sufficient correspondence between the *allegata* and *probata*. *Ib.*

61. See *Bill of Credit*, 1, 3; auditor's warrants are not bills of credit, and forgery may be committed of them.

62. See *Evidence*, 156; on a trial of an overseer for murder of a slave, the general habit of such overseer, in punishing slaves, not admissible in evidence.

63. Where the accused was indicted for suffering a gaming table to be exhibited in the house occupied by him, it was held, that it was no excuse for him that he had let the rooms in which the exhibi-

tion took place, and when he let them had no knowledge or expectation that they would be used for that purpose; both he and his tenants would be equally amenable to the statute. *Mount v. The State*, 7 S. & M. 277.

64. See *Evidence*, 209; an accused person cannot be forced into trial by an admission, on the part of the state, of the truth of what he swears, in an affidavit for a continuance, certain absent witnesses will prove; if he consents to go to trial on such admission, it is an admission of the *absolute truth* of the facts, he alleges the witnesses will swear to.

c. Indictment.

65. An indictment commencing with the words, "the state of Mississippi," and concluding "against the peace and dignity of the same," if in other respects formal, is sufficient. *State v. Johnson*, Walk. 392; *Greeson v. State*, 5 How. 33.

66. If the words *then* and *there* precede every material allegation it will be sufficient, though they do not precede the conclusions. *Ib.* Walk. 392.

67. In an indictment under the act of 1830, prohibiting any person other than Indians from making settlement within the territory, it is necessary to aver that the defendant is not an Indian. *State v. Craft*, Walk. 409.

68. The caption of an indictment, in these words, viz.: "the grand jurors of the state of Mississippi, empanelled and sworn in and for the body of the county of Warren," is sufficient to show that the grand jurors were of the county of Warren. *Byrd v. State*, 1 How. 163.

69. The caption to an indictment

need not show that the grand jury were *then and there* sworn. *Shaffer v. State*, 1 How. 238; *Woodsides v. State*, 2 How. 655.

70. Where an indictment, prepared in 1833, averred the crime to have been committed in 1033; it was *held*, to be bad, as averring a fact inconsistent with the known laws of nature, and alleging an offence against this state prior to its existence. *Serpentine v. State*, 1 How. 256.

71. Counts for robbery and larceny may be joined in the same indictment. *Damewood v. The State*, 1 How. 262.

72. Where the defendant is charged with having feloniously taken and carried away the article alleged to be the subject of the larceny, it will be sufficient, though the indictment do not contain the word "*stolen*." *Ib.*

73. The caption of an indictment, in these words, "The state of Mississippi, Wilkinson county ss.: The circuit court of Wilkinson county, October term, thereof, &c.; the grand jurors of the state of Mississippi, empanelled, &c., in and for the county of Wilkinson and state of Mississippi, &c.," shows that the court which found the indictment was holden in this state. *Woodsides v. State*, 2 How. 655.

74. The indictment averred that the mortal wounds were inflicted on the 8th of September, and the deceased died on the 13th of the same month, and that A. W. and R. W. were *then and there* present, aiding, &c.; *held*, that there was no uncertainty in the charge as to time, with reference to the accessories. *Ib.*

75. An indictment may be returned by a grand jury at a spe-

cial term of the circuit court. *Young v. State*, 2 How. 865.

76. The indictment will be bad, unless the name of the prosecutor be indorsed thereon. *Cody v. State*, 3 How. 27. *Peter v. State*, 3 How. 433.

77. The caption of the indictment must show not only that the court was held, and the grand jury selected and empanelled in the proper county, but it must also show that the court was held at the particular *place* fixed by law, and it must directly and affirmatively show it; presumptions will not be indulged. *Carpenter v. State*, 4 How. 163; *Thomas v. State*, 5 How. 20.

78. Under the statute of this state of 1839, on the subject of retailing ardent spirits, an indictment charging in substance that the defendant sold vinous and spirituous liquors, to wit, rum, &c., to persons unknown, in less quantities than one gallon, and suffered it to be used and drank about his house, contrary, &c., will be good. *Kliffield v. State*, 4 How. 304.

79. So, also, a charge against a tavern-keeper under the same act for giving away, without charge, liquor under the prohibited amount, *to persons unknown*, guests of the tavern-keeper, is good. *Ib.*

80. If there be one good count in an indictment, and the defendant has been found guilty generally, the conviction will be upheld. *Ib.*; and to the same effect *Friar v. State*, 3 How. 422; and *Miller v. State*, 5 How. 250.

81. Where a defendant, in an indictment for selling liquor, was in some parts of the indictment styled "yeoman," in others "tavern-keeper," and "inn-keeper," and in some parts "Clifffield," and

in others "Klifffield," the variance will be immaterial. *Kliffield v. State*, 4 How. 304.

82. Indictments may be tried at the same term of the court at which they are found. *Noe v. The State*, 4 How. 330.

83. The time of the commission of the offence of larceny laid in the indictment is not material; that will be satisfied by proof of the offence at any anterior day. *Oliver v. State*, 5 How. 14.

84. If it appear by the record that the foreman of the grand jury was appointed, and returned the bill indorsed "a true bill," as such foreman, and the caption states, that the grand jury returned the bill; it will be sufficient evidence of the finding of the bill by the grand jury. *Greeson v. State*, 5 How. 33.

85. An indictment for an assault with intent to kill, under the statute of this state, must allege that the accused did *assault and beat* the person alleged to have been assaulted, with an instrument alleged to be a *deadly weapon*. *Ainsworth v. State*, 5 How. 242.

86. Where a statute, provided that "it should not be lawful for any person to sell or retail any vinous or spirituous liquors in less quantities than one gallon, nor suffer the same nor any part thereof to be drank or used in or about his or her house;" it was *held*, that the statute embraced two distinct offences, the one the selling, and the other the permitting the liquor to be drank, and an indictment charging both offences in the same count, will be bad for duplicity. *Miller v. The State*, 5 How. 250.

87. Where the indictment is indorsed "a true bill," and returned by the authority of the whole grand jury, it is sufficient, without the spe-

cial appointment of a foreman. *Friar v. State*, 3 How. 422. *Peter v. State*, *ib.* 433.

88. If the time and place of holding the court appear in any part of the record, it will be sufficient. *Loper v. State*, 3 How. 429.

89. Where the caption of an indictment stated that the court was held "for the county of S., at the court house in the town of R.," and that town was incorporated by an act of the legislature, and by another act of the legislature the county site of the public buildings was located at that town; *held*, that the caption sufficiently showed that the court was held in the place designated by law. *Kelly v. The State*, 3 S. & M. 518.

90. Numerical figures are admissible in an indictment to express numbers and dates; if however they be illegible the indictment will be bad for uncertainty. *Id.*

91. The language in the record that "the grand jurors returned into court an indictment against G., indorsed thereon "a true bill, M., foreman of grand jury," and returned to consider of further presentments; said indictment is in words and figures following to wit, &c.," establishes that the indictment was found by the grand jury, and the accused had been indicted in due form. *Goodwyn v. The State*, 4 S. & M. 520.

92. In an indictment under the act of 1839, chapter 26, entitled an act "further to suppress and discourage gaming," it is not necessary to state the particular game of cards played; the charge, that "the defendant did play at a game at cards," is sufficiently definite. *Johnston v. State*, 7 S. & M. 58.

d. *Jury*; and herein of the empanelling and discharging of both Grand and Petit Juries, and of what disqualifies, and of Jury generally.

93. On an indictment for grand larceny, the jury, not being able to agree up to the last moment when the term of the court ceases by limitation of law, may be discharged without the consent of the accused, and he may be lawfully remanded to jail for trial at the next term of the court. Even in capital cases, the jury may be discharged where a striking necessity exists. *State v. Moor*, Walk. 134.

94. A juror cannot be asked before he is challenged, by either the state or the prisoner, whether he has formed or expressed an opinion as to the guilt or innocence of the prisoner. An opinion formed and expressed on rumor subject to be changed by evidence, does not disqualify a person as juror. *State v. Flower*, Walk. 318. *State v. Johnson*, *ib.* 392.

95. If the juror have formed a *fixed* opinion, even though he has not expressed it, he should be excluded. *Id.*

96. See *Jury*, 6, 9, 10, 11, 13; for the empanelling, qualification of, and challenge to.

97. Where it appeared on the indictment that a grand jury was sworn to inquire in and for the body of the county of W., and that A. B. was appointed foreman; *held*, sufficient evidence of A. B.'s appointment. *Byrd v. State*, 1 How. 247; *Idem*, *Woodside v. State*, 2 How. 655; *Cody v. State*, 3 How. 27.

98. A prisoner who fails to make objection to the grand jury at the time of trial, cannot in a higher court afterward object that some

of them were disqualified. *Cody v. State*, 3 How. 27.

99. It will vitiate a verdict in a criminal case if a person not a sworn officer, be permitted to go into the jury room, after the jury have retired to make up their verdict, or if the jury be left in the charge of such person. *Hare v. State*, 4 How. 187.

100. Mere impressions do not disqualify a juror where he has neither formed nor expressed an opinion, and feels impartial, though testimony will be required to remove his impression. *Noe v. State*, 4 How. 330.

101. A challenge to the array, for want of form and not for corruption in the officer who summoned the jury, will be disregarded. *Thomas v. The State*, 5 How. 20; *King v. The State*, 5 How. 730.

102. A juror must be sworn and challenged, before he can be interrogated as to his opinion. *King v. State*, 5 How. 730.

103. It does not disqualify a juror that he has formed and expressed an opinion from rumor only, his mind being free to act upon the testimony. *Ib.*

104. The jury may, by the assent of the prisoner and the district attorney, or by direction of the court, bring in a sealed verdict, deposite it with the clerk, and then separate, before it is opened and read. *Friar v. State*, 3 How. 422.

105. The affidavit of a juror will not be received to impeach his verdict; a juror, therefore, should not be permitted to testify that he only agreed to the verdict on condition a new trial should be recommended to the court. *Ib.*

106. The certificate of the clerk of the probate court that the list of jurors by whom an indictment is

found, was drawn in open probate court, in the mode prescribed by law, when the circuit clerk has failed to draw the jurors as required, is evidence to the circuit court, that the panel has been properly drawn. *Nixon v. State*, 2 S. & M. 497.

107. See *Jury*, 30-32; for qualifications of grand jury; and whether defects in, can affect any indictment found by them after its return into court.

108. See *Jury*, 33. The statute limiting the right of prisoners to twelve peremptory challenges is not unconstitutional.

e. Larceny.

See *Criminal Law*, *supra*, tit. *Indictment*.

109. A statute which makes promissory notes for the payment of money and paper bills of credit the subjects of larceny, will be construed to embrace bank notes for the payment of money; but in an indictment for stealing such a note, it must be described as a bank note as well as a promissory note for the payment of money. *Damewood v. The State*, 1 How. 262; *sed aliter*; *Greeson v. State*, 5 How. 33, where *Damewood v. State*, is reviewed and bank notes are held the subject of larceny, and may be described *eo nomine*, both at common law and under the statute.

110. If one lose his goods and another find them and convert them to his own use, not knowing the owner, it is not larceny; though, if he knew the owner, or had the means of knowing him, it would be larceny. *Randal v. State*, 4 S. & M. 349.

111. Although larceny may be committed of a runaway slave, (the law making it the duty of every citizen who finds one runaway, to

deliver him to the nearest justice of the peace for commitment,) yet where the proof on an indictment for stealing a slave, was that the slave had been runaway for five months, and when caught, was in a tree in the woods, and that the prisoner was seen while the slave was runaway, travelling along the road in the direction of the owner's residence with a slave, resembling and believed to be the runaway; and the jury brought in a verdict of guilty; *held*, that the evidence did not warrant the verdict, and was not sufficient to put the accused to an explanation. *Ib*.

112. See *Slander*, 10; a charge of having stolen a *bee tree*, not slanderous, because a *bee tree* is not the subject of larceny.

113. See *Slaves*, 36, 37; how far master, &c.; liable for costs of prosecution of slave, convicted of larceny. See *Slaves*, 29, 30; how far master liable for the value of property stolen by his slave.

f. Murder and Manslaughter.

114. Murder may be committed of a slave. *State v. Jones*, Walk. 83; *Idem. Kelly v. State*, 3 S. & M. 518.

115. The term "*reasonable creature*," in the definition of murder, means a human being, and embraces idiot, lunatic, or unborn child and slave. Walk. 83.

116. The term "king's peace," in the definition of murder, means the place where the crime was committed, and embraces persons attainted, outlawed, or even alien enemies not engaged in battle. *Ib*.

117. The law implies malice, from the use of a deadly weapon. *Woodsides v. State*, 2 How. 655.

118. On indictment for murder, the prisoner may be found guilty of

manslaughter; our statute not having changed the common law. *King v. State*, 5 How. 730.

119. Sentence of the court on a conviction for manslaughter, can only be pronounced in the presence of the prisoner, and must affix a date for the imprisonment to commence; and if either requisite be omitted the high court of errors and appeals will reverse the *judgment* but not the *verdict*, and remand the case for a proper *judgment*. *Kelly v. State*, 3 S. & M. 518.

g. Perjury.

120. Where an affidavit, in order to procure a search-warrant, alleged that a felony had been committed, if untrue, it will be perjury, though the offence was not charged on any particular person. *Carpenter v. State*, 4 How. 163.

121. An affidavit made before a justice of the peace, for the purpose of procuring a writ of *habeas corpus* from a circuit judge, if false in a material matter, will be sufficient to uphold a conviction for perjury. *White v. State*, 1 S. & M. 149.

122. But the falsehood must be in a *material* matter, all the person has to swear, to procure the writ, is, that he is illegally detained in custody, whatever else he may swear by way of inducement, such as that he was forced into trial without his witnesses, &c., is immaterial. *Ib*.

h. Trial; and herein of how far prisoner may be twice tried for same offence.

123. On indictment for grand larceny, if the jury cannot agree up to the last moment at which the court may be legally holden, they may be discharged without the prisoner's consent and he be re-

manded to jail for trial at the next term of the court; nor will the clause in the constitution of the United States, "that no one for the same offence shall be twice put in jeopardy of life on trial," though binding on the state courts, apply to such a case, as a prisoner is not put in jeopardy until after verdict. Even in capital cases the jury may be discharged where a striking necessity exists. *State v. Moor*, Walk. 134.

124. A conviction or acquittal on an invalid indictment is no bar to a second prosecution for the same cause; an indictment for stealing a negro man is insufficient; and a trial and acquittal on such indictment is no bar to a trial for stealing "a negro man *slave*." *State v. M'Graw*, Walk. 208.

125. Where a former judgment of the circuit court had been reversed for errors occurring during the trial not affecting the plea; it is not necessary to arraign the prisoner a second time on the next trial. *Byrd v. State*, 1 How. 247.

126. The plea of former trial for the same offence, must allege a conviction or acquittal, or the plea will be a nullity. *Hare v. State*, 4 How. 187.

127. By the words "speedy trial," in the constitution, by an impartial jury to each person indicted, is meant a trial according to the rules of law, and any delay caused by those rules is not in the meaning of the constitution; where therefore a prisoner indicted for murder cannot, according to the rules of law, be put on his trial until the last judicial day of the then term of the court has partially elapsed, it will not be a violation of

the constitution to postpone the trial, on the application of the state, to the next term. *Nixon v. State*, 2 S. & M. 497.

128. In criminal prosecutions, after verdict and judgment of acquittal, a new trial cannot be granted the state, unless the acquittal be on the ground of variance between the proof and the indictment. *State v. Anderson*, 3 S. & M. 751.

CROP.

1. By virtue of the act of 1840, prohibiting the sheriff "from levying on or selling, by virtue of execution or other process, any crop of cotton, corn or other product, while the same is under cultivation and before it is matured and gathered," such crop while in that condition, is not subject to the lien of a judgment upon which the execution, the levy of which was prohibited, might issue. *Planters Bank v. Walker*, 3 S. & M. 409.

2. Where a plantation, with a growing crop thereon, was sold, the right to the crop which, until severed, was part of the freehold, passed with the land; and the crop, when severed, would not become subject to an execution against the vendor of the land. *Ib.*

CUSTOM.

1. See *Bank*, 13; how far custom will affect contract.

2. See *Attorney at Law*; how far custom, contrary to law, may be set up by attorneys against their clients.

3. See *Insurance*, 11; custom must be general, to bind parties.

D.

DAMAGES.

1. See *Contract*, 17, as to when specific damages recoverable.

2. See *Practice*, 27, when excessive damages will be noticed by high court as ground of error.

3. On a judgment affirming the dismissal of a writ of error *coram nobis*, the appellate court will give the damages allowed by the statute giving damages on the affirmance of a judgment or decree for the payment of money. *Mitchell v. Fearn*, 3 How. 122.

4. See *Judgment*, 32; when action in debt and judgment in damages.

5. See *Process*, 11, where verdict exceeds amount demanded by indorsement on the writ.

6. An agreement for liquidated damages may be enforced for the non-performance of covenants of an uncertain nature and amount; but otherwise where the covenant is certain and fixed as to the amount; where, therefore, R. agreed to sell B. certain property, for which B. agreed to pay fixed sums at fixed times, R. to make B. a deed when the first payment was made; when B. was to execute his notes and a deed of trust to secure them; and they agreed that if either failed to comply with the contract he should pay the other \$5000 by way of liquidated damages and not as penalty; it was held that the \$5000 would be a mere penalty. *Bright v. Rowland*, 3 How. 398.

DANCING RABBIT CREEK TREATY.

1. See *Evidence*, 96–98; as to what evidence admissible in a suit by Indian, claiming land under said treaty.

2. Where an Indian released his rights of Indian citizenship to the state of Mississippi, but afterwards the United States treated with him as an Indian, and granted him a reservation of land, under the treaty, his release of citizenship will not affect his title to the land thus reserved as against a party claiming title to it; it is a matter between the government and the Indian. *Newman v. Harris*, 4 How. 522.

3. The 14th article of this treaty, which grants “reservations” of land to certain heads of families who indicate their intention to become citizens in the mode pointed out in the treaty, and that if such head of the family reside upon the land, intending to become a citizen for five years after the ratification of the treaty, a grant in fee simple shall issue, is equivalent to a *grant* of the lands thus reserved to the Indian, with a condition subsequent of residence; the non-performance of which will defeat the grant. *Ib.* And the residence must be in person, and not by agent. *Harris v. Newman*, 3 S. & M. 565.

4. A voluntary abandonment of the land reserved will defeat the right; and a removal to avoid a prosecution, is voluntary. *Ib.*

5. An official certificate is evidence only where the matter certified comes within the official duty or cognizance of the officer; the certificate therefore of the agent of the United States to receive applications under the treaty, is only evidence of such application, and the identity of the land, and not that the reservation was in pursuance of and according to the terms of the treaty. *Ib.*; and it will be error to reject such certificate as evidence for that purpose. *Harris v. Newman*, 3 S. & M. 565.

6. It is not necessary that the Indian should have had a residence or improvement on the land claimed, at the time of the treaty; it is sufficient if his residence commence within six months of that time. *Ib.*

7. The reservation mentioned in the treaty, is a section of land, to contain six hundred and forty acres, to be bounded by sectional lines; but if the centre of the improvement be on a corner, he would be entitled to take his reserve out of the four sections; but if the reservation do not conform to the rule, but be recognized by the government before the rights of others accrue, it seems it will be sufficient. *Ib.*

8. The term reservation, used in the treaty, is equivalent to a grant. *Ib.*; *Niles v. Anderson*, 5 How. 365.

9. The confirmation of an Indian reservation, cannot be proved by parol, it is susceptible of higher proof. *Harris v. Newman*, 3 S. & M. 565. Though the location of the land claimed by such Indian may be so proved. *Coleman v. Tish-ho-mah*, 4 S. & M. 40.

10. The acts of agents under the treaty, may be impeached for fraud. *Ib.*

11. Actual registration by the agent of the government, is not necessary to entitle the Indian to his reservation; but the signification of his intention to the agent, and the compliance on the part of the Indian with the provisions of the treaty, vests the Indian with a perfect legal title, and no patent from the government is necessary; and the right of such Indian having become complete by the signification of his intention to remain, to the agent, subject to the forfeiture by a removal within five years, cannot be effected by a refusal of the agent to register his name; but such removal, to constitute a forfeiture, must be *voluntary* and not brought about by the force of others; and such Indian, whose title has become perfect under the treaty, and has been dispossessed, may bring his action of ejectment and recover the possession. *Coleman v. Tish-ho-mah*, 4 S. & M. 40; *Hit-tuk-ho-mi v. Watts*, 7 S. & M. 363; *Land v. Land*, 1 S. & M. Ch. 158.

12. Where an Indian's right has become complete under the treaty by the signification of his intention to remain, to the agent, an alienation by the government to a third party, of the lands thus reserved, whether by mistake or otherwise, was wholly void, for want of authority to make it. *Ib.* *Hit-tuk-ho-mi v. Watts*, 7 S. & M. 363.

13. The rule that a party must recover upon the strength of his own title, and not upon the weakness of his adversary's, holds equally in equity as at law; where therefore, under the 14th article of the Dancing Rabbit Creek treaty, granting reservations of land to the head of each Choctaw family, and to each of his children, a bill of Choc-

taw Indian, setting up title in himself to the portion of land reserved for his children was filed, it was held, it must be dismissed, as the treaty intended to secure to the head of the family only one section, and to each of the children the amount stipulated in the treaty. *Pickens v. Harper*, 1 S. & M. Ch. 539.

DEBT.

1. See *Judgment*, 32; when action in debt and judgment in damages.

2. See *Contract*, 23; for when debt will lie where no promise, express or implied, to uphold it.

3. See *Jeofails, Statute of*, 18; what defect in declaration in, cured by.

4. See *Judgment*, 109; in debt on bond with breaches assigned, the judgment by default, must be with a writ of inquiry and not final.

5. See *Slaves*, 30; debt is the remedy against master, where money has been stolen by slave.

DEED AND DEED OF GIFT.

1. A deed implies a consideration. *Minor v. Michie*, Walk. 24.

2. A purchaser has notice of every defect disclosed by any recital in any deed essential to his title. *Chew v. Calvert*, Walk. 54.

3. A married woman's deed is void. *Herrington v. Herrington*, Walk. 322.

4. A seal without words in body of deed adopting it as a seal, is not a seal. *Bohannon v. Hough*, Walk. 461.

5. See *Consideration*, 5; a differ-

ent consideration from that expressed, cannot be proved.

6. Where it was doubtful whether the instrument offered in evidence was a will or a deed, the facts of its execution and delivery and declarations of the maker at the time, and the instrument itself should go to the jury. *Herrington v. Bradford*, Walk. 520.

7. A paper signed by the party but not sealed, is not a deed, though intended as such. *Davis v. Brandon*, 1 How. 154; *Thompson v. Thompson*, 2 How. 737.

8. See *Evidence*, 55, 187, 188; how far parol evidence admissible to explain latent ambiguity in deed, and what constitutes it.

9. A paper not sealed admitted to record, not thereby rendered more valid. *Thompson v. Thompson*, 2 How. 737.

10. See *Chancery*, 134; when deed of gift cancelled at suit of parent.

11. See *Evidence*, 73, 74. For proof of deed where subscribing witness.

12. A consideration expressed in a deed to have been paid by the grantee to a third person is sufficient to uphold the deed. *Holley v. Curtis*, 3 How. 230.

13. A deed must contain sufficient certainty in the description; the sale of a "certain parcel of land in the county of Jackson, on the sea coast, on the west side of Biloxi, containing one hundred and seventy-three acres," is void for uncertainty. *Ib.*

14. It is a sufficient description of land in a deed to describe according to sections, township, and range. *Bledsoe v. Little*, 4 How. 13.

15. That a deed bears date anterior to the patent to the vendor

does not vitiate it; the title of the vendor will enure to the benefit of his vendee, even though at the time of sale the vendor had no power to sell for want of title, where he afterwards acquires it. *Ib.*

16. A deed to property in the adverse possession of another, under color of title, it seems, is void for maintenance. *Ib.*

17. It is a presumption which may be fairly indulged, that possession under a deed is compatible with the boundaries given in the deed. *Ib.*

18. A deed takes effect by sealing and delivery, and without proof of these it is without effect, and is inadmissible in evidence for any purpose; its genuineness must be proved. *Ib.*

19. A deed received in good faith, and which is accompanied with the delivery of possession to the grantee, even though the grantor have no title, is sufficient color of title in the grantee to constitute his possession adverse. *Ib.*

20. A gift by deed, not recorded, of a slave from uncle to nephew, where the possession, under a provision in the deed, is retained by the donor, will not prevail against a subsequent donee by deed of gift from the same donor accompanied with possession; in pleading, therefore, the deed of gift, he must aver that possession accompanied it, or the plea will be bad. *Marshall v. Fulgham*, 4 How. 216.

21. The declarations of the grantor in a deed made after the execution of the deed, are not evidence against the grantee to impeach the deed. *Ferriday v. Selser*, 4 How. 506.

22. See *Forthcoming Bond*, 15; as to how far parol evidence admissible to show authority to fill up

blanks in forthcoming bond, or deed.

23. Where a deed is a mere inducement, as where a party is suing for the price of land agreed to be paid, to which he was to execute a deed, profert of the deed need not be made, but if made, the other party is entitled to *oyer* of it. *Bright v. Rowland*, 3 How. 398.

24. A deed which is not proved and recorded within the time required by the statute, is not void, but is binding between the parties and those having notice of it. *McAnulty v. Bingaman*, 6 How. 382.

25. By the statute of this state, creditors are, alike with subsequent purchasers, affected by notice of a prior unregistered deed, which will be valid against creditors with notice; and possession of the property will constitute notice of the title of the occupant. *Dixon v. Lacoste*, 1 S. & M. 70.

26. The statute of 1822, requiring deeds respecting the title of personal property to be recorded in that county in which such property shall remain, and declaring all such deeds void as to all purchasers for a valuable consideration, without notice, and as to all creditors, when such property is removed to a different county and the deed is not recorded there within twelve months from the date of such removal, applies to marriage contracts, by which the husband settles personal property on the wife before marriage. *Moss v. Davidson*, 1 S. & M. 112. The act does not apply to conveyances made prior to its passage. *Palmer v. Cross*, 1 S. & M. 48; nor will the lien be defeated if the property be removed without the permission of the grantee, and that permission must be shown.

Bogard v. Gardley, 4 S. & M. 302.

27. M. in the year 1808, in Virginia, settled certain slaves upon her daughter during life, and after death upon her children, by deed, which was recorded in the proper county in Virginia in about eighteen months after its execution; the parties resided in the same place until 1835, when they moved to Tennessee, and in 1836 they moved to this state; in the year 1838 the husband of the donee died; the deed of settlement never having been recorded in this state; *held*, that the property conveyed by the deed of settlement was not liable to the husband's debts. *Palmer v. Cross*, 1 S. & M. 48.

28. See *Evidence*, 226; when grantor in a deed, competent witness, and when parol evidence admissible to explain ambiguity in deed.

29. The certificate of a justice of the peace, that the grantor in a deed "*acknowledged* the foregoing instrument to be his act and deed," is equivalent to the certificate required by the statute, that the grantor "*acknowledged* that he signed, sealed, and delivered the foregoing deed," &c. and is a sufficient acknowledgment. *Halls v. Thompson*, 1 S. & M. 443.

30. The old common law rule, that a man cannot stultify himself and allege his own incapacity to make a deed, has been very properly exploded, and now a man may show his own incapacity as a ground for vacating his deed. *Rice v. Dignowitty*, 4 S. & M. 57.

31. See *Fraud*, &c. 28, 29, 30; when deed is void by fraud of grantor; and that also where grantee did not participate in the fraud.

32. An acknowledgment of a

deed that is to the effect of the form prescribed by the statute, is sufficient; where, therefore, in the acknowledgment of a sheriff's deed, the clerk omitted the name of the sheriff from the acknowledgment, which read as follows: "Personally appeared before me, G. C., clerk of the probate court in and for said county, whose name is subscribed to the within deed, and," pursuing the form in other respects, it was *held* a sufficient compliance with the statute. *Pickett v. Planters Bank*, 5 S. & M. 470.

33. Whether the certificate of the record of a deed, by a deputy of the probate clerk, in his own name and not in that of his principal, is a valid certificate of such record? *Quære*? Yet if such a deed be read without objection in the court below, the high court would not lend a willing ear to that objection raised there. *Hundley v. Buckner*, 6 S. & M. 70.

34. Where a deed was offered in evidence, the certificate of the record of which was made and dated several years after the actual record of the deed, such certificate, until disproved, is sufficient evidence of the proper record of the deed. *Ib.*

35. Where a vendor of land in his bond for title describes the land as lying on a certain creek in the county, in certain sections, without giving the particular subdivisions of the sections, or the township and range in which the land lies, the description will be sufficient; as the location on the particular creek removes the uncertainty as to the subdivisions and township. *Hazlip v. Noland*, 6 S. & M. 294.

36. See *Dower*, 29; grantor, sued for breach of warranty, because a dower was laid off by the probate court in the land, may show that

the land was not subject to the dower.

37. A deed conveying all the vendor's lots in a certain town is not uncertain, but is sufficient to convey all the vendor's interest derived by a deed from the commissioners who laid off the town. *Harmon v. James*, 7 S. & M. 111.

38. By the statute of the Mississippi territory, which made all deeds not recorded within twelve months from their date of execution, void as against a subsequent purchaser or mortgagee without notice, a subsequent purchaser or mortgagee from the same source or grantor is meant; as to all those claiming title from a different source the unregistered deed would be as valid without recording as with it; where, therefore, a deed was made in 1806 from a person claiming under a Spanish grant and the deed was not recorded until 1841, and in 1823 the United States government granted a patent to the land to a different party, the deed from the Spanish grantee would not be void as against such patentee. *Sessions v. Reynolds*, 7 S. & M. 130.

39. Although, as an abstract proposition, it is true that a grantor who disposes of land by a valid operative deed cannot subsequently dispose of the same land by a valid operative deed to a different person; yet, if the original conveyance be defective, the second would pass the estate; whether if the same person claimed under both grants he may establish his right under either as he may please; *quare?* *Ib.*

40. See *Release*, 1; for the nature of deed of release and its effect in passing title to land.

41. The covenants raised by law from the use of particular words in the deed are only intended to be

operative when the parties themselves have omitted to insert covenants; where the grantor does insert covenants, they constitute the extent of his liability. A deed, therefore, which contains the words *grant, bargain and sell* (which words the statute gives a certain construction to,) but concludes with an express covenant of warranty, imposes no further liability on the grantor than is contained in his express covenant. *Weems v. M'Caughan*, 7 S. & M. 422.

42. The recitals in the premises of a deed are important, as their office is to explain the motives and reasons on which the deed is founded; the main object of a deed is to be gathered from its provisions; when that is ascertained it must prevail; and a proviso or condition repugnant to the grant, if the grant be specific, is void, but if it be not specific the proviso or condition does not defeat it, and a proviso which is only explanatory is good. *Williams v. Claiborne*, 7 S. & M. 488; and also the same case, 1 S. & M. Ch. 355; where, therefore, property was conveyed in trust, and one declaration of trust was in conflict with and repugnant to the premises, recital, *habendum* and every other declaration of trust, the former must yield and be rejected. *Ib.*

43. A party is estopped by his covenants in a deed to claim any right under the deed inconsistent with the covenants. *Ib.*

44. Wherever the description in a deed is imperfect, yet sufficient to point inquiry to the true locality and boundary of the land, then the deed is not void for uncertainty, but the defect may be cured by the aid of parol evidence in giving identity to the premises intended to be conveyed; as where the description of

a lot sold was perfect in all respects except that it said, "beginning — feet from such a point," it was *held* the deed was not void for uncertainty. *Jenkins v. Bodley*, 1 S. & M. Ch. 338; *Bingaman v. Hyatt*, *Id.* 437.

45. A deed unduly registered, either for the want of a valid acknowledgment, or otherwise, is not notice to subsequent purchasers; possession is, however, notice to creditors as well as subsequent purchasers, and affects them with the knowledge of an unregistered deed or one improperly registered, and makes such deed, as to them, as valid as though it had been registered. *Walker v. Gilbert*, Freem. Ch. 85.

46. A judgment at law is a lien only on the interest of the judgment debtor, and will not affect, therefore, the right of a party claiming under a previous, though unduly registered deed. *Id.*

47. The registration of a deed conveying a mere equitable title is not notice to subsequent purchasers; the statute operates upon none other than deeds conveying the legal estate. *Id.*

48. See *Partners*, 32; the destruction and surrender of a deed will not divest the estate of the grantee therein.

49. To make a deed, executed by an agent, binding on the principal, it must be executed in the name of the principal, by the agent; a conveyance, in the name of the agent, and signed by him, as for his principal, is not the contract of the principal, and is binding merely upon the agent. *Holmes v. Carman*, Freem. Ch. 408.

50. A description in a deed, in these words: "lying, and being in the county of Yazoo, and state of

Mississippi, situate on Short creek, about three miles from Manchester, in township eleven, range two west, in sections eight, nine, ten, and fifteen, containing about two thousand acres," *held*, to be sufficient. *Bingaman v. Hyatt*, 1 S. & M. Ch. 437.

51. The words *grant*, *bargain*, and *sell*, in a deed, do not, under the statute of this state, amount to a general warranty, or a covenant of seizin; but merely that the grantor has not done any act, nor created any incumbrances, whereby the estate might be defeated. *Latham v. Morgan*, 1 S. & M. Ch. 611.

52. The words "lawful heirs," and "her heirs forever," in a deed, are words of limitation of the estate to the donee, and not words of purchase for the heirs. *Warren v. Haley*, 1 S. & M. Ch. 647.



DEFEASANCE.

S. executed his notes, in payment of land and negroes, to R. for a certain sum, payable on a fixed day; and R. in the deed to S. agreed to take bank paper, in payment of the notes; *held*, that the agreement in the deed formed no part of S.'s contract to pay; but was simply a defeasance, by strict compliance with which, S. might avoid the payment of the notes in specie, and if he did not tender them to R. at the maturity of his own notes the contract of defeasance would be at an end, and the principal contract would remain absolute. *Saunders v. Richardson*, 2 S. & M. 90.

DEMURRER TO EVIDENCE.

1. A demurrer to the evidence removes the cause from the consideration of the jury to the court, who must decide the questions of law and fact, presented by the demurrer; it is therefore erroneous, where the court overrules the demurrer, to submit the testimony to a jury again; judgment should be entered by the court, and if damages have to be assessed, a jury should be empanelled for that purpose. *Hall v. Browder*, 4 How. 224.

2. On demurrer to the evidence the court will construe the testimony as a jury would, and will draw every inference which a jury might reasonably draw; where a notary, therefore, testified that he gave notice on the day of the demand, and the evidence was demurred to, the court will presume a legal notice was given. *Chewning v. Gatewood*, 5 How. 552.

DETINUE.

1. Where a judgment in detinue was obtained in Kentucky, for certain slaves, and their alternate value, as assessed; and the plaintiff in detinue, under the view that the alternate value was assessed too high, remitted a part, and the defendant removing the slaves from Kentucky to this state, and depositing in the court of that state where the judgment was had the residue of the alternate value not remitted; *held*, that an action of detinue for the slaves could not be maintained in the courts of this state, upon the judgment in Kentucky; as the negroes could not be had in that state, the payment of the alternate

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value extinguished the judgment there. *Jennings v. Gibson*, Walk. 234.

2. Wager of law is abolished in this state. *Ib.*

3. The *descriptio rei*, in an action of detinue for a slave, has always been deemed sufficient to enable the jury to assess some value, and the amount is immaterial, if the defendant can deliver the slave; and a new trial is, in that case, never granted for an excessive assessment. *Ib.*

4. Where, under a mistake of law, the plaintiff remitted the alternate value assessed in detinue, he could not maintain a new action of detinue for the same property, founded on his first judgment in detinue. *Ib.*

5. Even where the alternate value in detinue is not paid, a new action in detinue cannot be maintained in a different forum on the first judgment in detinue; but an action for the alternate value only. *Ib.*

5. Where a judgment in detinue has been had for the mother, which had been merged in a satisfaction of the alternate value, a new action of detinue cannot be maintained for the child, born since such judgment. *Ib.*

6. In an action of detinue the service of the writ is a sufficient demand. *Carraway v. McNeice*, Walk. 538.

7. The jury should assess the value of each and every article found, but if not done, under our statute, the court may award a writ of inquiry to ascertain the same. *Ib.*

8. Possession of personal property at one time, is sufficient title to maintain the action of detinue, until a right to dispossess is shown. *Berry v. Hale*, 1 How. 315.

9. A judgment in detinue for the property in controversy, or a fixed sum for its value, without adding after the property, "if to be had," will be a mere informality, cured by the statute of jeofails. *Ib.*

10. In an action of detinue the rule is, that, although possession by the defendant must be proved, it is not necessary that the proof of possession must extend up to the time of the commencement of the suit, and the plaintiff will be entitled to recover, unless the defendant has been, since the commencement of his possession, lawfully dispossessed; where, therefore, an administrator was sued in detinue for a slave, it will be no bar to the suit that he surrendered the slave to a sheriff, who had an execution against him as administrator, the slave not being the property of the intestate. *Loury v. Houston*, 3 •How. 394.

11. See *Contract*, 39; whether detinue can be maintained where the contract of title vested no present interest in plaintiff, but one depending on a contingency.

12. The action of detinue, in this state, survives by virtue of the statute, which provides "that all actions shall survive, except actions of slander, and for injuries, or torts done to the person;" whether it would survive at common law, *quære?* *Worten v. Howard*, 2 S. & M. 527.

13. In an action of detinue, the legal title alone is in controversy, if there be equities they must be settled in some other mode; M. conveyed a slave to B. in trust, to secure W. R. & Co. a debt; after the execution of the deed the slave was sold under an execution against M., junior to the deed, and bought by H.; the trustee sold the slave

under the deed, in the absence of the slave, and while in H.'s possession, to L. R. M.; and thereupon instituted an action of detinue, for the use of L. R. M. against H., for the slave; *held*, that, as the action of detinue could not be maintained by one for the use of another, the name of the usee in the record, was wholly superfluous, and might be disregarded. *Hundley v. Buckner*, 6 S. & M. 70.



DISCONTINUANCE.

1. See *Parties*, 6: Where process is not served.

2. In a suit on a joint and several contract, the plaintiff may discontinue as to some of the defendants, and proceed to judgment against others. *Montgomery v. Commissioners of Sinking Fund*, 7 How. 13; *Nevitt v. The Natchez Steam Packet Co.* 5 How. 196; *Peyton v. Scott*, 2 How. 870; *Soria v. Planters Bank*, 3 How. 46; *Woodhouse v. Lee*, 6 S. & M. 161.

3. The plaintiff may take a judgment by default final, on the special count on a note, without discontinuing as to the common counts. *Gridley v. Briggs*, 2 How. 830; *Soria v. Planters Bank*, 3 How. 46; *Lillard v. Planters Bank*, 3 How. 78; *Grant v. Planters Bank*, 4 How. 326. And that too, though the plea of non-assumpsit be filed to the common counts. *Rankin v. Sanders*, 6 How. 52.

4. The plaintiff, in an action under the statute of 1837, cannot discontinue as to the maker, and take judgment against the indorser, where all parties are served with process. *Wilkinson v. Tiffany*,

5 How. 411; *Brunson v. Lea*, 5 S. & M. 149. But he may discontinue as to a portion of the makers not served. *Harrison v. Agricultural Bank*, 2 S. & M. 307.

5. See *Judgment*, 78: for practice, where a part of the defendants make default, and a portion plead.

6. See *Scire Facias*, 10: Discontinuance as to one party to a judgment, discontinues it as to all.

7. Where a party defendant pleads a plea, which begins only as an answer to part, and is in truth but an answer to part of the action, and the plaintiff demurs to the plea, and no discontinuance is moved for in the court below, but upon the demurrer being sustained, and a judgment of *quod recuperit* rendered for plaintiff, the defendant brings the case to the high court, and asks there that the action be discontinued: *Held*, that the judgment of the court below should not be disturbed and a discontinuance should be refused. Whether the old rule of pleading, which made the demurrer or replication of a plaintiff to a plea which answered but part of the action, operate as a discontinuance of the whole action, is in force and operation here? *quare*? *Harrison v. Balfour*, 5 S. & M. 301.

8. Where the payee of a joint note, the makers of which reside in different counties, sues them all in a joint action, in the county where one of them lives, and by writs to the different counties brings them all before the court of that county, and the maker residing there pleads to the action while the others make default, the holder of the note may discontinue his suit as to that maker, and take judgment by default against the others. *Read v. Re-*

naud, 6 S. & M. 79; *aliter*, if none of the parties live in the county where the suit is brought, but are brought in by writs to the counties of their residence; in such case, the suit must be dismissed. *Bank of Vicksburg v. Jennings*, 5 How. 425.

9. See *Abatement*, 13: When discontinuance as to party improperly joined in action *ex contractu*, will cure the error.



DISTRESS.

Where cattle are *damage feasant*, the owner of the land may, under certain restrictions, seize and distrain them; but not unless the owner of the cattle would be liable to an action for the trespass, and therefore not where the fence was bad; if the owner of the soil kill or injure the cattle distrained, he will be a trespasser from the beginning. *Dickson v. Parker*, 3 How. 219.



DISTRIBUTION.

1. See *Hotch-Pot*, 1: When advancement must be brought into.

2. A decree for distribution without the administrator being made a party, will be erroneous. *Porter v. Porter*, 7 How. 106. All the claimants to distribution must be made parties. *Shattuck v. Young*, 2 S. & M. 30. *Sed contra*; any one of the distributees may, at the expiration of the time limited, apply by petition to the probate court, without joining his co-distributees, and the probate court will compel distribution on his entering into the bond required. *Benoit v. Brill*, 7 S. & M. 32.

3. Illegitimate children are not included in our statute of descents, unless their parents afterwards intermarry, which cures their illegitimacy. *Ib.*

4. The widow and heir may unite in a petition for distribution, against the administrator of the personalty. *Smith v. Hurd*, 7 How. 188.

5. Where a petition by the legatees of a deceased person did not state the condition of the estate to be distributed, or whether a sufficient time had elapsed to entitle them to distribution, or show the character of the rest of the estate: *Held*, it was doubtful whether a decree of sale would be granted on so vague a petition. *Shattuck v. Young*, 2 S. & M. 30.

6. In the distribution of the personal estate of deceased persons, the law of the domicile of the decedent regulates. *Garland v. Rowan*, 2 S. & M. 617.

7. Where a freeman of color applied by petition to the probate court to have distribution of his father's estate, alleging in the petition that he was the natural son of his father, and that the legislature of the state had granted him all the right, title and interest, which it had by the law of escheat in his father's estate, and had by act confirmed his manumission, and the administrator answered, denying the freedom of the petitioner, asserting that he was the property of the estate, and that there were other persons claiming to be heirs of the deceased, but offered no proof of the slavery of the petitioner: *Held*, that the petitioner made out a *prima facie* case of a right to distribution, and that the petition should be allowed by the probate court, unless the administrator

should require an issue to the circuit court to ascertain the alleged freedom of the petitioner. *Benoit v. Brill*, 7 S. & M. 32.

8. After distribution of the estate of a deceased person, under an order of the probate court, the superior court of chancery has not jurisdiction of a bill by a person alleging himself to be a distributee, whose claims had been overlooked or disregarded in the distribution in the probate court, against one of the other distributees, to recover from him a ratable proportion of the estate; the remedy is in the probate court. *Gaines v. Smiley*, 7 S. & M. 53.

DIVORCE.

See *Husband and Wife*; as to divorce for ill treatment; and what a bar to alimony; and for divorce generally.

DOWER.

1. The widow is entitled to dower in land which her husband in his lifetime was entitled to as a donation claim under the act of congress of March, 1803; though the husband die in December, 1803, and the claim be not recognized in the heirs of her husband, until 1806, and no patent issue to them until 1819. *Hackler v. Cubel*, Walk. 91.

2. Widow has right to dower in land where certificate only has issued from the government; and that right is not divested by sale under execution. *Fleeson v. Nicholson*, Walk. 247.

3. A woman married and domiciled in Louisiana, is nevertheless, on the death of her husband, enti-

tled to dower in real and personal estate situate here, according to the laws of this state. *Duncan v. Dick*, Walk. 281. *Sed contra*; she is dowable in the personalty, including slaves, according to the law of the domicile; whether the same rule would apply if the domicile were in a free state; *quære?* *Garland v. Rowan*, 2 S. & M. 617.

4. A widow is endowable of an equity of redemption as against the heirs of her husband, but not as against the mortgage creditor if she has relinquished dower to him. *Rutherford v. Munce*, Walk. 370.

5. On a petition for dower, out of several tracts sold by the husband in his lifetime, without the relinquishment of the wife, the entire portion of the wife ought not to be assigned out of but one of said tracts. *Cook v. Fisk*, Walk. 423. *Ib.* 476.

6. An agreement before marriage that man and wife should each enjoy their own property during marriage, and dispose of it at death, no bar to the widow's dower. *Whitehead v. Middleton*, 2 How. 692.

7. The statute assigning dower regards the children of the first marriage in determining the second wife's extent of dower. *Ib.*

8. The widow is dowable in the mortgaged property of her husband as against all the world but the mortgagee or his representatives. *Ib.*

9. The probate court has full jurisdiction in questions of dower, whether the contest be between the widow and heir, or the widow and strangers; and on proof of the possession of the premises by the husband in his lifetime, the widow will be entitled to dower against all the world except those who may

have the paramount title, and a stranger cannot set up such paramount title to bar the widow's dower. *Randolph v. Doss*, 3 How. 205; *Doss v. Armstrong*, 6 How. 258.

10. Where a claim for dower was contested on its merits in the court below, and decided for the widow, and the record did not show that there was proof of the widow's marriage; it was *held*, that the defendant could not on that account, object to the decree in the high court; the objection should have been made in the court below. *Ib.*

11. Where a publication was ordered by the probate court, on an application for dower, and dower afterwards allotted, it will be presumed that the publication was made, if the contrary do not appear; at all events, if a stranger appear and contest the widow's right, he cannot object to the want of notice. *Ib.*

12. Whether, in a petition for dower the allegation that the widow claimed dower "on the endowment of the husband," be sufficient averment of seisin and possession or not, it is too late to make the objection after a contest of the dower on the merits. *Wooldridge v. Wilkins*, 3 How. 360.

13. Those who have derived title from the husband cannot deny his seisin so as to bar the widow's dower. *Ib.*

14. If the husband has once received the title it is immaterial for how short a time it may abide in him, the wife is entitled to dower; whether, where a husband on receiving conveyance, *eo instanti* conveys the title out of him by mortgage to secure the purchase-money, the widow is dowable in the property, seems to be a ques-

tion of doubt as against the mortgagee ; but until entry and foreclosure, she has a legal claim for dower against all the world besides, even though she join in the mortgage ; and if she do not join in the mortgage she can claim her dower even as against the mortgagee. *Ib.*

15. Where a widow who has united in the mortgage seeks to have her dower allowed as against the mortgagee, she must go into equity and offer to pay off one third of the mortgage debt ; she will stand in the same situation as the widow of one who has mortgaged before marriage. *Ib.*

16. Lands purchased by partners to be used for partnership purposes or as joint stock, will be liable for partnership debts, and the widow of one of the partners will not be dowable therein ; if however the lands be purchased as estates in common and not for the partnership business, the widow will be dowable therein ; therefore, where two brothers were engaged in the practice of merchandise, and bought town lots with the partnership's property, which were sold to pay partnership debts, the widow of one of the partners will be dowable therein. *Ib.* See also, to the same effect, *Markham v. Merrett*, 7 How. 437.

17. The widow is dowable in lands according to their value at the time of the alienation of the husband ; she cannot reap the advantage of improvements by the alienee. *Ib.* See also, 7 How. 437.

18. An infant feme covert who has aliened her dower, may, on the death of her husband, sue for and recover it, notwithstanding such alienation, and she will not be compelled to refund any portion of the purchase-money received by her

husband. *Markham v. Merrett*, 7 How. 437.

19. Under the statute of this state, the widow is authorized to renounce her rights under the will given in lieu of dower, and insist on dower at any time within six months from the time of the probate of the will ; if she permit the six months to elapse by a single day she will forfeit her right to renounce, and must abide by the will. *Ex parte Moore*, 7 How. 665.

20. It is no answer to the petition of a widow for dower in her deceased husband's real estate, that she has disposed of his whole personal estate, of greater value than the dower in the realty she was seeking to obtain. *Caruthers v. Wilson*, 1 S. & M. 527.

21. The probate court, though it has jurisdiction to allot dower, has not jurisdiction to enter into an inquiry with reference to the conduct of the widow in appropriating the personalty tortiously to her own use ; on proof of seisin during coverture, where she has not since aliened, the probate court must allot her dower. *Ib.*

22. The widow's right to occupy the mansion-house of her deceased husband until her dower is assigned is a personal privilege which cannot be transferred ; the heirs at law may therefore maintain ejectment against third persons claiming under the widow, before the assignment of dower. *Wallis v. Smith*, 2 S. & M. 220.

23. Where an executor, having authority by the will to sell the real and personal estate, sold the realty ; and the widow united in the deed for a nominal consideration without intending to give up her right to an equivalent, out of the purchase-money, for her dower in the realty so

sold, and the widow applied by petition to the probate court for her one-third of the proceeds of the sale and the probate court dismissed the petition for want of jurisdiction; *held*, that if by the terms of the will and the action under it, the real estate was reduced to personality, the court had jurisdiction and should entertain the petition. *Hart v. Dunbar*, 4 S. & M. 273.

24. If a widow voluntarily and without fraud practised on her, for a nominal consideration alien her right of dower in realty, it seems the probate court will have no jurisdiction of a petition by the widow for compensation out of the personality of her husband for her interest in the realty thus released; she must rely for compensation on her contract, express or implied, by which she parted with her dower, and must seek relief in a court having jurisdiction of contracts. *Ib.*

25. Where the probate court has, upon petition, allotted dower, that allotment operates only on the parties to the proceeding in the probate court, and does not reach the paramount title; and if allotted without notice it is void and no bar to the rights of any one; and the person holding the paramount title to that of the dowress may contest her right in any court having jurisdiction. *Farmers and Merchants Bank v. Tappan*, 5 S. & M. 112; and where there are adverse claimants the probate court cannot try the rights, but must allot the dower to the widow and leave the adverse claimants to contest her rights in the court having jurisdiction of such controversies; such allotment does not determine the widow's right, if contested; and the party contesting it may set up and maintain a paramount title to

that of the widow, in the proper courts, and if the adverse claimants litigate their rights in the probate court and that court decide them, the decision will be void for want of jurisdiction, and the rights of the parties will remain the same after as before such decision. *James v. Rowan*, 6 S. & M. 393. Where, therefore, A., the widow of B., applied to the probate court to be endowed of certain slaves owned by B. in his life-time, and C. by petition claimed the slaves by purchase from B. before his death, the court tried the issue and awarded the slaves to C.; *held*, that the court had no jurisdiction of C.'s petition; should have dismissed it and allotted the dower to A. *Holloman v. Holloman*, 5 S. & M. 558; and if dower in property is allotted to the widow and she fail to receive it, or is evicted, her part must be again allotted or compensation awarded her out of the estate. *Ib.*

26. J. W. filed her petition for dower in the lands of her alleged husband, G. W.; J. S., the grantee of her husband, contested her right of dower, on the ground that she was not the wife of G. W. On the trial of the petition it was proved that J. W. was married to G. W. in 1814, and that in 1815, M. F., who had been married in 1809 to G. W., was alive; G. W. and J. W. after their inter-marriage lived together as man and wife for twenty-five years, until the death of G. W.; *held*, that the wife of G. W. being alive when he married J. W., the latter marriage was absolutely null and J. W. not his wife, and therefore not entitled to dower in his lands. *Smart v. Whaley*, 6 S. & M. 308.

27. The representatives of the deceased husband are the only pro-

per parties to a proceeding by the widow to be endowed of her husband's realty; on proof of marriage, of seisin of the husband during coverture, of non-alienation on the part of the wife and the death of the husband, she as against his representatives, is entitled to dower in his realty; the rights of third persons are in nowise affected by a decree of the probate court allowing dower to the widow in her deceased husband's realty; those who have such rights may put the widow to her ejectment or other appropriate remedy; and in such proceeding the respective claims will be considered in a great degree as if no decree of the probate court had been pronounced; therefore where a deed was made to J. and his sister, conveying a tract of land to them jointly; on the application of the widow of J. for dower in the land thus conveyed, his sister being in possession; *held*, that the widow of J. was, in the absence of proof of ouster or of the adverse possession of his sister, entitled as against his representatives, to dower in the land; nor could the probate court enter upon an inquiry as to whether J. was a trustee for his sister who had paid the purchase-money for the land: that inquiry could come up when the widow attempted to enforce her dower. *James v. Rowan*, 6 S. & M. 393; *Ib. Ware v. Washington*, 6 S. & M. 737.

28. A widow, having to establish seisin in her husband, is not entitled to dower in lands which her husband held only by virtue of a lease for ninety-nine years; such lease vested only a chattel interest in the husband, out of which the widow is not dowerable. 6 S. & M. 737.

29. Where the grantor in a deed, is sued for a breach of his covenant

of warranty, and the alleged breach consist of the recovery of dower in the land conveyed, by an order of the probate court; it is competent for the grantor to show that the land was not subject to the dower, allotted out of it. *Enos v. Smith*, 7 S. & M. 85.

30. The interest allowed by law to the widow, in the personality of her deceased husband, is considered by our statute as dower therein, and must be proceeded for in the probate court, in the mode pointed out by the statute. (H. & H. 421, § 123.) A petition, therefore, for dower in personalty, that does not set forth in what the personalty consists, nor that the deceased died in the county where the petition was filed, nor what the property in which the interest was claimed, is defective, and liable to demurrer; but leave to amend should be granted by the court. *Caillaret v. Bernard*, 7 S. & M. 316.

31. Where a grantor, in a deed which conveyed the fee simple in land to the grantee, took from the grantee an acknowledgment that he held the land subject to the just debts of the grantor, and charged with their settlement; and the grantor subsequently marries and dies, his widow will be entitled to dower in such realty; and if the property thus conveyed be the mansion-house of the husband, in which he was residing at the time of his death, she may, even though her dower has not been formally allotted to her, set up her possession, as widow and dowress of the mansion-house, in bar of an action of ejectment, by such grantee; and even though it appear in proof on the trial that the premises are held in possession by a tenant of the widow, yet, if it do not appear that she

has given a lease or actual transfer of her privilege of possession, and she be let in to defend in the action, it is competent for her to rely on her right of possession, under the statute. (H. & H. 353, § 47.) *Ib.*

32. F. and others, administrators of B., sold the real estate of B. to E., and filed their bill to foreclose the statutory lien for the purchase-money. B.'s wife had dower allotted to her in the lands, and sold her right of dower to E., who died; E.'s widow resists the application to foreclose the statutory lien, and claims dower in the dower right purchased by E.; *held*, that the purchase of E. of the dower right of B.'s widow, went to the benefit of the administrators, and that E.'s widow was not entitled to dower in the premises. A widow being dowerable only of an estate of inheritance; a mere life estate not being the subject of dower. *Fisher v. Grimes*, 1 S. & M. Ch. 107.

33. S. G. purchased land, sold on execution; he afterwards conveyed the same with covenants of warranty for himself and his heirs and died; *held*, that the widow of the execution debtor, who was a daughter and one of the heirs of S. G. and, as such, had received from his estate a sum greater than the value of her right of dower in the land, was estopped, by the covenants of her ancestor, to claim dower in such land, all the heirs of S. G. being insolvent. *Torrey v. Minor*, 1 S. & M. Ch. 489.

34. A statute of limitations of possessory actions, embraces an application for dower. *Ib.*

35. The right of a widow to dower in the property of her deceased husband, until ascertained and admeasured by metes and bounds, is a mere potential interest, amounting to nothing more than a *chose in action*, and cannot be seized and sold under an execution at law. *Ib.*

E.

EJECTMENT.

1. The plaintiff in ejectment must recover on the strength of his own title, and upon a legal, not an equitable one. *Winn v. Cole*, Walk. 119.

2. At common law an heir could not recover on a demise laid in his name during the lifetime of the ancestor, because the heir had not then the right of possession, but after issue joined, the statute of *jeofails* cures the defect. *Ib.*

3. In actions of ejectment, it is now necessary in all cases to prove the defendants' possession of the disputed premises at the time of the commencement of the suit. *Newman v. Foster*, 3 How. 383.

4. The only case in which a special consent rule is necessary, is where an actual entry is necessary to be made upon the lands previous to suit brought. *Ib.*

5. The amendment of a consent rule not explaining the rights of parties, is not ground of error. *Ib.*

6. Where a verdict in ejectment is for all the plaintiff claims, and he only shows title to part, the writ of possession must be limited to that part; and if it be not so limited in the inferior court it will be in the high court. *Bledsoe v. Little*, 4 How. 13.

7. See *Execution*, 19; how far variance between that and judgment affects sale of real estate.

8. A judgment and execution or decree and execution with the levy and sale are all that are necessary to make out title in an action of ejectment for land sold at sheriff's sale, as against the defendant in the execution. *Starke v. Gildart*, 4 How. 267.

9. Possession of land is a sufficient protection against a title obtained by fraud. *Niles v. Anderson*, 5 How. 365.

10. A decree was granted, authorizing the levy of an execution on any land of which G. died seized; a levy and sale was made under the decree, and in an action of ejectment by the purchaser, it was proved that in the life-time of G. there was a decree of the chancery court, subjecting the land, (sold under the decree against G.) to the payment of a certain sum of money due to F.; it was also proved that twenty years had elapsed since the sum was to be paid under the decree, and that neither G. nor his heirs had been disturbed in their possession; held, that though at the time of the death of G. that decree might have been an outstanding incumbrance; yet that the presumption from lapse of time was of its payment, and would relate back to the death of G.; and that the land would properly be subject to the execution. *Stark v. Gildart*, 5 How. 606.

11. See *Judgment*, 61; the effect of reversal of judgment in ejectment on the rights of the parties, and the liability of the plaintiff who has taken possession under a judgment afterwards reversed.

12. The holder of a naked legal title, cannot oust his beneficiary in ejectment; therefore where B. paid for land, but permitted the legal title to be made to W., B. being all the time in possession; the heirs of W. cannot oust B. in ejectment at law. *Brown v. Weast*, 7 How. 181.

13. In an action of ejectment, the return on the declaration is a sufficient one in these words, viz.: "Executed the within declaration and notice upon the within named A. B., April 25, 1843;" the affidavit of service required by the common law is dispensed with by our statute. *Williams v. Oppelt*, 1 S. & M. 559.

14. In an action of ejectment, it is error to enter a judgment by default against the tenants who neglect to appear and make themselves defendants; it should be rendered against the casual ejector. *Ib.*; the process however, must always be served on the tenant in possession. *Wallis v. Smith*, 2 S. & M. 220.

15. See *Dower*, 22. Heirs at law may maintain ejectment against third persons in possession of the mansion-house of their ancestor, before assignment of dower to the widow, notwithstanding they claim under her.

16. The plaintiff in ejectment in order to recover must prove possession in the defendant. *Wallis v. Smith*, 2 S. & M. 220.

17. In an action of ejectment, by the purchaser under an execution against the defendant in exe-

cution, no evidence of the title of the latter at the time of sale is necessary; if the defendant acquire an adverse title subsequently, he must establish it. *Robinson v. Parker*, 3 S. & M. 114.

18. Upon a joint and several demise, laid in the same count, in a declaration in ejectment, if either be sustained by the proof, a recovery may be had according to the fact. *Rice v. Dignowitty*, 4 S. & M. 57.

19. Boundary is always provable by parol, in ejectment. *Surget v. Little*, 5 S. & M. 319.

20. See *Evidence*, 152, 153; when surveys are evidence.

21. Where P. B. had two distinct judgments against R. and H. respectively, and sold and received sheriff's deeds to the same piece of land under each judgment, by both of which it was bound, R. and H. having each owned at different times, during the lien of each judgment, the tract of land; *held*, that, even though the sheriff's deed of the land to P. B. under the judgment against R., should prove defective, the other would be sufficient in an action of ejectment against those claiming under H. to recover the land. *Pickett v. Planters Bank*, 5 S. & M. 470.

22. A failure to prove possession of the defendant, in an action of ejectment, defeats the plaintiff's right of recovery; yet where that question is not raised in the court below, it loses much of its force when raised in the high court, and but slight evidence of possession will be required; where, therefore, the defendant in an ejectment, read two leases to himself on the trial, from persons claiming under the person through whom the plaintiff in the ejectment claimed, the leases

will, in the absence of other proof, furnish sufficient evidence of his possession to uphold a verdict against him. *Ib.*

23. The following description of the *locus* in the declaration is sufficient, viz.: (after describing its vicinity to other lands,) "the W. $\frac{1}{2}$ of the N. W. $\frac{1}{4}$; the S. E. $\frac{1}{4}$; the E. $\frac{1}{2}$ of the S. W. $\frac{1}{4}$ of section 23, and the W. $\frac{1}{2}$ of the N. W. $\frac{1}{4}$ of section 26, township 11, Range one west." *Ib.*

24. In ejectment the legal title only is in issue, and therefore a perfect equitable title in the plaintiff in ejectment will not prevail against the naked legal title in the defendant in the ejectment; where, therefore, the interest of a vendee, who has received a bond for title on payment of the purchase-money, and has paid it, is sold under execution, the purchaser, although he acquires a perfect equitable title, cannot recover possession from the holder of the naked legal title; though the holder of such legal title be but a trustee for the holder of the equitable title. *Thompson v. Wheatly*, 5 S. & M. 499.

25. In an action of ejectment, in which the lessor of the plaintiff claims through a purchaser at sheriff's sale, a certified copy of the judgment, and a certified copy of the *venditioni exponas*, under which the land was sold, are the only parts of the record that need be introduced to uphold the sheriff's deed. *Carson v. Huntington*, 6 S. & M. 111.

26. It is no ground of objection to a verdict and judgment in ejectment that the record does not show a plea of not guilty, where the parties appeared and tried the cause upon its merits. *Caillaret v. Bernard*, 7 S. & M. 111.

ESCHEATS.

1. See *Executor and Administrator*, 5; as to right of administrator of alien deceased, to collect his effects. *Bolls v. Duncan*, Walk. 161.

2. See *Distribution*, 7. The legislature can grant to individuals, the right of the state to escheated property, and the grant will clothe them with power to sue for and recover it.

EVIDENCE.

- a. *Confessions when Evidence.*
- b. *Copies when Evidence.*
- c. *Depositions.*
- d. *General Principles.*
- e. *Notarial Evidence; and herein of Notarial Records.*
- f. *Parol Evidence when admissible to vary written contract.*
- g. *Witness; who competent, and what disqualifies.*

a. *Confessions, when Evidence.*

1. Confessions of guilt made under the influence of fear and of personal violence, even though made before a magistrate, are not evidence against the prisoner, and testimony will be received to show under what circumstances such confessions were made. *Serpentine v. The State*, 1 How. 256.

2. Whether; where the accused spoke a foreign language, and the interpreter testified that although he thought he knew what the prisoner said at the time, yet from his imperfect knowledge of the language he was not certain, the interpreter's testimony of the declarations would be evidence against the prisoner. *Quære? Ib.* Where a prisoner in custody makes confessions, without any compulsion or promise of advantage, they are evidence

against him. *Peter v. State*, 3 How. 433.

3. Confessions made by a prisoner under the influence of a sufficient threat or promise, are inadmissible as evidence; subsequent confessions however, made not under the influence of the previous threats or promise, are admissible; but the presumption is that the threat or promise once made continues to operate; where, therefore, a slave who had been charged with crime, was threatened, by a party armed with guns, that if he did not confess he would be hung, and he did confess his guilt, and shortly afterward was taken before a magistrate in the presence of some of the same persons and was interrogated by the magistrate as to his guilt without being previously cautioned by the magistrate as to the effect of his replies, and again made confession of his guilt; *held*, that neither his first nor last confessions were admissible against him in evidence. *Peter v. The State*, 4 S. & M. 31.

b. *Copies, when evidence.*

4. Before a copy can be received in evidence there must be proof of the loss of the original, and that diligent search and inquiry were made of those entitled to the possession of it, in vain; where, therefore, a witness testified that the original of a certificate of entry of land had been transmitted to the land office at Washington city, and that he had since received instructions from that office to deliver it to the plaintiff; *held*, that a copy of such certificate could not be read without proof that the original was not on file in the office at Washington city. *Freeland v. McCaleb*, 2 How. 756.

5. Where the statute of this state

authorized copies of records appertaining and belonging to the land offices of the United States to be evidence, when authenticated by the officer having them in charge, a certificate by the register of the land office, to a map, that it was a correct *representation of part of a township*, according to the township map in his office, will not authorize the map to be read as evidence. *Martin v. King*, 3 How. 125.

6. An *ex parte* affidavit of a witness, appended to a survey, that the original was lost out of his possession, is not sufficient to permit the introduction of the copy. *Ib.*

7. The mere certificate of the clerk of the register of the land office, of entries of land, is no evidence; the books of the register being public in their nature, sworn copies would be evidence. *Woolbridge v. Wilkins*, 3 How. 360.

8. The copies from the records in the land office, of notices of pre-emption claims and confirmation of claims, and of the journals of commissioners appointed by act of congress to adjust claims to land, are competent testimony to establish an ancient boundary line, if not to show title. *Vick v. Peck*, 4 How. 407.

9. Where the originals of documents are required by law to be placed in the department of Indian affairs, copies of them, properly certified, will be evidence. *Newman v. Harris*, 4 How. 522.

10. A copy of a mortgage is not evidence without accounting for the absence of the original by showing that it was out of the power of the party to produce it; where, therefore, it was in proof that the original mortgage was on file in the chancery court at Jackson, as an exhibit in a cause therein pending,

and, by the rules of that court, the original could be withdrawn, and there had been sufficient time for that purpose, it was *held* that the copy could not be read. *Hwydon v. Moore*, 1 S. & M. 605.

11. Where a defendant, in order to introduce a copy of a deed averred to be lost, was sworn to prove the loss, and stated that he had assigned the deed to one G., and all his interest in the land, but did not state that the deed was lost or that G. had been subpœnaed, or that any effort had been made to procure the original; *held*, that no sufficient foundation had been laid for the introduction of the copy, and it was inadmissible. *Chaplain v. Briscoe*, 5 S. & M. 198; to the same effect, *Harmon v. James*, 7 S. & M. 111.*

12. Copies of the official maps of the surveys of the lands in this state, deposited in the surveyor general's office, are the best evidence of the extent, character, and boundaries of such surveys. *Surget v. Little*, 5 S. & M. 319; *Sessions v. Reynolds*, 7 S. & M. 130.

13. Under the statute of this state, which makes duly authenticated copies of the records appertaining and belonging to the land offices of the United States established in this state, evidence where the originals would be, the duly authenticated copy of a certificate of confirmation, by the board of commissioners west of Pearl River, of a Spanish grant of land, taken from the records in the land office at Washington in this state, is competent testimony without accounting for the original. *Ib.*

* By the act of the legislature of 1844, copies of deeds and other recorded instruments are now evidence without producing or accounting for the original.

c. Depositions.

14. Depositions will not be excluded, because in the handwriting of the attorney for the party taking them. *Donoho v. Petit*, Walk. 440.

15. It is not error to permit a deposition, informally taken, to be read, when it was the condition upon which a continuance was granted. *Hamilton v. Cooper*, Walk. 542.

16. A deposition admitted at one trial, without objection, may be ruled out on the next, on objection. *Smith v. Natchez Steamboat Co.* 1 How. 479.

17. To admit depositions taken in one case, to be read in another, the parties must be the same, or in privity, and the question in controversy the same; it must appear that, had the testimony been different, it would have been prejudicial to the party introducing them; the verdict and judgment rendered in one case, must be evidence in the other, and the legal existence of the first suit must be established. Where, therefore, depositions were taken in a suit at law, between H. as executor of B., against J. H. to recover certain negroes, to which J. H. laid claim, by virtue of a deed of gift from B., which suit, at law, terminated in favor of H., executor of B.; they will not be evidence in a suit in chancery, at the suit of J. H. and others, (claiming title to the same negroes involved in the suit at law, and other negroes, by virtue of the same deed of gift) against H., as executor of B., and also against the legatees in B.'s will; they would not be admissible, for the difference in parties, and the want of privity, those claiming under the same instrument not being thereby privies.

Harrington v. Harrington, 2 How. 701.

18. Affidavits to take the depositions of witnesses, *de bene esse*, must show upon their face to what case they are intended to apply, and, where taken before an officer of limited jurisdiction, that they were taken in his jurisdiction; without which, the affidavit will be defective, and the deposition excluded. *Saunders v. Erwin*, 2 How. 732; and unless it appear affirmatively in the record that the requisites of the statute as to affidavit and notice, have been complied with, depositions taken *de bene esse* will be excluded; nor can the defect be cured by amendments on the trial, or by parol evidence. *Ib.*

19. The substitution of depositions for oral testimony, belongs to civil trials; in no state of circumstances, under our constitution, can the deposition of a witness be used against the accused, in a criminal prosecution, and a similar rule seems to prevail as to depositions of witnesses in his favor, unless by his consent; therefore, where a prisoner makes an affidavit for a continuance, the state cannot force him into a trial, by admitting the truth of what the alleged absent witness would depose to; such admissions in criminal cases should never, except in extreme cases, be allowed; but where once made it constitutes an admission, not merely that the absent witnesses would have sworn to certain alleged facts, but also that the facts alleged are absolutely true. *Dominges v. The State*, 7 S. & M. 475.

20. A deposition taken under a commission directed to A. or B., will be regular; and if the commissioner certify that the witness

was *duly sworn*, it will be sufficient. *Martin v. King*, 3 How. 125.

21. A deposition, to which the objection of competency was reserved, will be fatally defective, if the notice to the opposite party of its taking, do not appear in the record. *Picket v. Ford*, 4 How. 246.

22. Where a deposition, *de bene esse*, is taken under the statute, it cannot be read on the trial, where the personal attendance of the witness can be had; and the offering the deposition must show diligence to procure the attendance of the witness, if within reach of the process of the court. *Ellis v. Planters Bank*, 7 How. 235.

23. Where, upon due notice and service of interrogatories upon the opposite party, a commission to take depositions is sued out, and from any cause the depositions are not taken under it, it is competent for the party taking out the commission to have another commission issued, without new notice or interrogatories to the other party, and the deposition under the last commission will be legal. *Copeland v. Mears*, 2 S. & M. 519.

24. Depositions taken *de bene esse*, are not admissible, without proof of the inability of the witness to attend in person; but if no objection is made to its admission in the court below, nor the point reserved by exception, the high court will not regard the objection, when made before it. *Neeley v. Planters Bank*, 4 S. & M. 113.

25. Where, in the interrogatories propounded to a notary, the bill of exchange is described as payable five *months* after sight, when in fact it was payable five *days* after sight, the description in other respects being correct, and the notary in his deposition noticed the mistake,

set out a true copy of the bill sued on, and testified with reference to it; *held*, that the misdescription was a mere clerical error, and did not vitiate the deposition. *Prescott v. Francis*, 4 S. & M. 633.

26. Where the deposition of a witness, residing in the county in which the trial takes place, was taken *de bene esse*, and it was proven that he had been duly served with subpoena to attend the trial, but at the time of the trial was absent from the state, without the consent or procurement of the plaintiffs; *held*, that the deposition could be read. *Rohan v. Odenheimer*, 5 S. & M. 44.

27. Where, under a statute providing that a commission to take the deposition of a non-resident witness, might issue, upon filing in the clerk's office a copy of the interrogatories, and giving the opposite party notice thereof, ten days before the commission was to issue, interrogatories were filed, and the opposite party waived, in writing, the privilege of filing cross-interrogatories; *held*, that this waiver dispensed with the ten days' notice, and a commission might properly issue forthwith. *Cook v. Martin*, 5 S. & M. 379.

28. Where, in interrogatories to take the deposition of a witness, to prove that at the time of drawing the bill sued on, the drawer had no funds in the hands of the drawee, the bill of exchange was not described with minute accuracy, but omitted certain words written across its face, and the indorsement on the bill; *held*, that the date of the bill being properly given, and the object of the deposition not being to identify the bill, but to prove a fact existing at the time of its execution, the omission in the description of

the bill was not material, and the deposition was admissible. *Ib.*

29. A commission, which issues from the office of the circuit clerk, for the purpose of taking a deposition, which does not contain the name of any commissioner, at the time it issues from the clerk's office, will be irregular, and the deposition taken under it must be excluded; and its exclusion will not be ground for new trial, as it was owing to the laches of the party who took it. *Rupert v. Grant*, 6 S. & M. 433.

30. Depositions taken in one suit are not admissible as evidence in another, unless both suits are between the same parties, or those who are privies in blood, in estate, or in law; therefore, in an action by B. against M. to recover \$1235, deposited by B. with M., to be returned when B. should prove that he paid E., or his authorized agent, the sum of \$950, to be applied on certain payments to be made by B. to L., B., in order to prove the payment of the \$950 to E., as agent of L., read depositions taken in a suit in the probate court, between L. and E.'s administrator, to recover money paid by B. to E., for L., *held*, that the depositions having been taken in a case to which B. was not a party, and M. only a party as the agent of L., were inadmissible to prove the payment in the suit between B. and M. *Merrill v. Bell*, 6 S. & M. 730.

d. General Principles.

31. See *Judgment*, 1. Judgment founded on attachment, no evidence in a suit on such judgment against the defendant. *Chew v. Randolph*, Walk. 1.

32. How far failure to examine witness, and discovery of new tes-

timony, ground for new trial; see *New Trial*, 3 and 4. *Hinds v. Terry*, Walk. 80.

33. See *New Trial*, 7, 8, 9; as to papers not read on trial being taken out by jury, and their examining witness except in open court. *Offit v. Vick*, Walk. 99.

34. Possession of note evidence of ownership. See *Bills of Exchange and Promissory Notes*, 8. *Smith v. Runnels*, Walk. 144.

35. Answer in chancery, how far evidence. See *Chancery*, 18. *Nichols v. Daniels*, Walk. 224.

36. See *Pleading*, 13; as to proof of consideration of note, where one is unnecessarily averred. *Moore v. Mickell*, Walk. 231.

37. Where the expressions in a letter are doubtful as to what demand it promises to pay; *held*, that in action against the writer on a bond barred by the statute, it should be left to the jury to say to what demand the letter applied. *Turnbull v. Witherspoon*, Walk. 351.

38. A statement by a witness, in his deposition, "that, so far as he knew or understood, the negroes in controversy were the property of the plaintiff," is incompetent testimony. *Wells v. Shipp*, Walk. 353.

39. A cotemporaneous declaration of ownership by the mortgagor of slaves, though not a party to the suit, yet one through whom one of the parties claimed, will be evidence; though declarations made by the mortgagor, at other times, will be excluded. *Ib.*

40. Records not between the parties to the suit, but connected with the *res gestæ*, and between those through whom the parties claim, are admissible; as where A. sues B. for a slave, A. may introduce the record of a suit between

C. & D., wherein it appears that the slave was sold as D.'s property, and bought by B. *Ib.*

41. Questions, suggesting the answer, are leading, and the answers are inadmissible. Thus: if A. is asked if he had not seen a letter written by H. to B., and was it not concerning T., and concerning his conduct as administrator of L., and whether H. did not say T. had sworn a lie? are leading questions. *Torrance v. Hurst*, Walk. 403.

42. The impressions, opinions, and faint recollections of a witness, based on circumstances, are not evidence unless those circumstances be detailed. *Ib.*

43. Possession of an order by drawee, *prima facie* evidence of payment of it. *Witherspoon v. Cain*, Walk. 407.

44. It is in the discretion of the judge to allow witness to be re-examined after the case has been argued, and the charge of the court delivered, and his refusal to do so is no ground of error. *Ib.*

45. A plaintiff in assumpsit may waive his special contract, and give it in evidence under the common counts; yet he cannot prove materials furnished under a count for work and labor done. *Richardson v. O'Neal*, Walk. 469; *Arnett v. Evans*, *Ib.* 471.

46. The answer of a defendant to an injunction bill to enjoin an action at law, is not evidence for him in the trial of the action; his answer and that of a defendant generally, is evidence against, but not for him. *Bien v. Weather-spoon*, 1 How. 28. .

47. See *Guardian and Ward*, 3 and 4; as to how far order of probate court, without advertisement, allowing account of guardian

against ward, is final, and evidence against ward.

48. A judgment, except between parties and privies, is not evidence in private litigation of the matter on which it is founded, but only of the fact that such judgment exists. *Moore v. Cason*, 1 How. 53.

49. To an action on a note, the defendant plead that it was given for a tract of land, to which the plaintiff fraudulently averred he had title, when in fact he had none, on replication denying allegations of this plea, and there being no proof; *held*, that the verdict was properly rendered for the plaintiff, as he was not bound to disprove the defendant's allegations. *Kyle v. Calmes*, 1 How. 121.

50. See *Assumpsit*, 5; as to how far plaintiff can recover when his proof varies from the special contract declared on.

51. See *Sheriff*, &c. 9; as to how far sheriff's return, evidence for sheriff.

52. A promissory note signed A. B. & Co., is no evidence of itself against D., in an action on the note against him, as surviving partner of A. B. & Co., in which they were averred to have been partners in the execution of the note; nor need D., under the law of 1824, which prohibited the makers of notes from denying their signature, except under oath, and which extended the same provision to such defendants as did not appear to have executed the notes, deny his execution of the note under oath, such note would be no evidence at all against D. without proof of the partnership. *Baughan v. Graham*, 1 How. 220.

53. Where the printed statutes of a state are offered as evidence, under the act of 1833, they must

appear to be published by the authority of the state. *Ib.*

54. A positive promise to pay a sum of money by a given date, with stipulations how the payment is to be appropriated, and with a proviso that the agreement shall be valid, if third parties do not within the stipulated period pay the sum agreed to be paid, is a positive promise, and in a declaration on it, no demand on such third person need be averred or proved. *Ib.*

55. A party may introduce his testimony in what order he sees fit, unless it be in laying the foundation of secondary evidence. *Byrd v. State*, 1 How. 247.

56. A witness may be asked, when testifying to a particular fact, if he had not, on a former occasion, stated that he knew nothing about the matter in controversy, by way of laying a foundation for impeaching his credibility. *Goode v. Lin-ecum*, 1 How. 281.

57. Where an action is brought for the breach of a warranty, whether it be *ex contractu* or *ex delicto*, a *scienter*, even if averred, need not be proved. *McLeod v. Tutt*, 1 How. 288.

58. Newly discovered testimony cannot be that of a witness who was sworn and testified at the trial, and who was of counsel for one of the parties, and knew of the testimony at the time. *Berry v. Hale*, 1 How. 315.

59. The books of a corporation, when proved to be such, are the best evidence as to the acts of the corporation, as between the members; the secretary of the corporation is the proper custodian of their books, but when he is dead, any member of the company may have the rightful possession of them, and such possession would

be sufficient to justify their production, in evidence, as against a member. *Smith v. Natchez Steam-boat Co.* 1 How. 479.

60. The original subscription paper to the stock of an incorporation, binding the subscribers to pay the stock as called for, is competent testimony, in an action by the incorporation against one of its members who has not paid up his calls of stock, and an action may be maintained on such paper. *Ib.*

61. Where two witnesses have testified to the same fact, one of whom was competent, and the other incompetent, the court will not therefore reverse the judgment. *Ib.*

62. It is not necessary that the exact words of a deceased witness who testified on a former trial should be proved; their substance is sufficient. *Smith v. Natchez Steam-boat Co.* 1 How. 479.

63. It will not be ground of error or for a new trial that a deposition read without objection on a former trial, was ruled out, on objection at a subsequent trial; nor would the court in any case grant a new trial for the rejection of testimony, unless that testimony was embodied in the record for the court to judge of its materiality. *Ib.*

64. Where the sale of a slave was proved and no proof offered as to its value; *held*, that the jury had a right to assess the average value at the time of sale. *Lewis v. Farish*, 1 How. 547.

65. See *Chancery*, tit. *Bill of Discovery*; how far bill of discovery unanswered, evidence.

66. See *Criminal Law*, 21; dying declarations evidence.

67. In an action on the record of a judgment in which the court, wherein it is rendered, is indiscrim-

inately titled by two different names, as the *County Court* and the *Court of Pleas and Quarter Sessions*; *held*, that it will be esteemed the same court and the record be evidence. *Strong v. Runnels*, 2 How. 667.

68. The admissions of a person, who, with two others, was sued in trespass for an assault and battery, but on whom the process was not served and who died prior to its being served, are not evidence against the other parties to the record. *Blackwell v. Davis*, 2 How. 812.

69. See *Judgment*, 34 and 35; how far judgment, evidence.

70. Where a statement which must be within the knowledge of one party is allowed by him to remain uncontradicted when made by the other, it will be an admission of the fact stated; but if the statement be not within the knowledge of the party addressed his failure to contradict it will not be an admission of its truth. *Edwards v. Williams*, 2 How. 846.

71. The transcript from the records of the probate court of another state, reciting certain persons to be heirs of another, will not be evidence of such heirship. *Jehr v. Tarball*, 2 How. 905.

72. A witness who answers a question on interrogation without being sworn, is improperly admitted to testify; but where the action was on an account and the testimony thus given was not touching the items of the account, and the court instructed the jury that if the plaintiff had not proved his account they must find for the defendant; and the evidence is not spread out in the record; but an exception taken simply to the answer to the query, by an unsworn witness, without the

irrelevancy of the answer appearing, this court will not disturb the verdict. *Leach v. Lebusan*, 2 How. 908.

73. Where a subscribing witness to a deed, who was proved to have left the state, was reported to be dead and had never been heard from; it was *held* competent to prove the admission of the grantor that the deed was his, and to prove the hand-writing of the grantor, without having proved that of the subscribing witness. *Downs v. Downs*, 2 How. 915.

74. Where a deed is twenty-nine years old it seems as rigid proof will not be exacted of its execution as though it were of more recent date. *Ib.*

75. The private knowledge of the judge must not control or influence the opinion of the judge unless he give testimony of it in court. *Smith v. Moore*, 3 How. 40.

76. Where, in an action of trespass, *quare clausum fregit*, a plat of the land on which it was alleged the trespass took place, made out, *ex parte*, by the county surveyor, will not be evidence of boundary in the case and should not be admitted before the jury. *Carmichael v. Trustees of School Lands*, 3 How. 84.

77. Under general issue, corporations and quasi corporations are bound at common law to prove their corporate character. *Ib.* Since the act of 1836, they are only bound to do so when it is denied by plea under oath. *Vicksburg Water Works and Banking Co. v. Washington*, 1 S. & M. 536.

78. Under the statute of this state the plea of general issue admits the execution of the instrument sued on. *Green v. Robinson*, 3 How. 105.

79. Where the defendants to an action of ejectment claimed title to the land in controversy by virtue of a Spanish patent dated in 1794, made complete by their citizenship in October, 1795, when the articles of cession between Georgia and the United States were made and confirmed by commissioners of the United States fully empowered, the record of a survey made under authority of the United States in 1805, by which the lines of the previous location were changed, will not be admissible testimony to affect the right to the land thus perfected under an elder patent. *Martin v. King*, 3 How. 125.

80. The surveyor general has no right to alter original lines; a map of his, therefore, which shows, on its face, such alteration will not be evidence. *Ib.*

81. See *Real Estate*, 21-23, for the true construction of grants of land where the description conflicts, and for the best evidence of identity of land granted. *Ib.*

82. The following held not to be leading questions; viz: Were you notary public at such a time and place? Did you, as such, protest this bill? Did you give notice of protest and demand and refusal to the drawers? if yea, when, to whom and where directed? in what manner, and were they in time to go out by the first mail after the protest? *Sadler v. Murrah*, 3 How. 195.

83. Where a declaration in case was filed for a breach of warranty by bill of sale, of an unsound negro sold at \$860; and the proof was of the warranty of two negroes sold for \$850; *held*, that the variance was such as to exclude the proof. *Tutt v. M'Leod*, 3 How. 223.

84. See *Sheriff*, 19; Judgment

against sheriff, evidence against sureties.

85. General reputation in the neighborhood is not admissible evidence on an indictment for fornication. *Overstreet v. The State*, 3 How. 328.

86. The mere certificate of the clerk of the register of the land office, of entries of land, is no evidence; the books of the register being public in their nature, sworn copies would be evidence. *Wooldridge v. Wilkins*, 3 How. 360.

87. Where there is no actual proof that the division lines of sections have been actually run, they can only be ascertained and fixed in the mode pointed out by act of Congress of the 11th Feb'y, 1805; whether they have been so run and marked is a question of fact for the jury on the evidence. *Newman v. Foster*, 3 How. 383.

88. The survey of the land is to be taken as part of the patent, and may be resorted to to control the calls of the patent; and if the survey show an artificial or natural boundary that can be well ascertained by marked trees or otherwise it will prevail, and *parol* evidence is admissible to establish it; even though it vary from the course or distance called for, it will nevertheless be taken as the true boundary; yet all lines on the survey are not conclusive evidence that the line was run; therefore, where a dotted line occurred in a survey, it was *held* competent to shew by *parol* that the line never was actually run and that surveyors used dotted lines to indicate lines that were never run. *Ib.*

89. A patent for land is evidence in a court of law that everything has been done which the law required to justify its issuance, and

its validity can only be questioned on the ground of fraud or mistake ; where, therefore, W. was authorized by law, to locate entries on lands not previously offered for sale, nor on town lots, and W. made his entries and received a patent, they will be presumed to have been made in accordance with the law, in the absence of positive proof to the contrary ; for although the court will judicially know the acts of congress on the subject of the entry of land, it cannot judicially know that the particular land was never entered. *Bledsoe v. Little*, 4 How. 13 ; *Carter v. Spencer*, 4 How. 42.

90. Where the testimony of a witness as to boundary was positive, and he added that his information was derived from the map of the survey and the directions of the plaintiff in the case, although his statements may come from a suspicious source, yet, being admitted to the jury without objection, they are not incompetent testimony. *Ib.*

91. Where a letter was written by one of the defendants in an action of trespass to the plaintiff, proposing to him to meet at a certain place and have a settlement for the injuries sued for, specifying them in the letter ; *held*, that the letter was competent testimony to go before the jury, to say whether it was an admission of liability or a proposal to buy the plaintiff's peace. *Prussel v. Knowles*, 4 How. 90.

See *Husband and Wife*, 16 ; how far confession of husband's adultery evidence.

92. In an action on a warranty of title to personalty, the record of a judgment against the vendee, by which the personalty was recovered from him under a superior title to his vendor's, is conclusive evidence against the vendor of the fact of

recovery and the quantum of damages ; and, if the vendor have notice of such suit, it will be also of the validity of the paramount title under which they were recovered ; and if the vendor were present in court when the case was tried, that will be sufficient notice of the suit. *Pickett v. Ford*, 4 How. 246.

93. See *Pleading*, 57, for what proof under non assumpsit sworn to, will establish execution of note.

94. See *Ejectment*, 8, for evidence in an action by purchaser at sheriff's sale against defendant in execution.

95. The admission or the rejection of evidence in the court below, will not be regarded as erroneous, unless the evidence in the case be all spread out in the record, that the court may see the materiality of the evidence thus rejected or admitted. *Ferriday v. Selser*, 4 How. 506.

96. A transcript of the registry of names, kept by the agent of the United States, under the fourteenth article of the Dancing Rabbit Creek treaty, of the Choctaw Indians who applied to become citizens, under the treaty, which allowed the agent to register the names of heads of families only, is admissible in evidence of such application, the presumption being that the agent admitted none on the list who were not heads of families. *Newman v. Harris*, 4 How. 522.

97. The application by an Indian, under the treaty, to the United States' agent, to become a citizen, specifying the lands claimed under the treaty, and the certificate of the agent that such Choctaw was registered for the land claimed, and directing the register to reserve it from sale, are evidence in a suit

by the Indian for the land, of the *identity* of the land claimed under the treaty. *Ib.*

98. Proof that a certain person was acting as the locating agent of the United States, under the treaty, made by parol, will be sufficient *prima facie* evidence, that he is such officer. *Ib.*

99. The drawee who has refused to accept the bill, is a competent witness for either party, in an action on the bill against the other parties, and where he was present in court, ready to testify, evidence of his statements would not be competent. *Carmichael v. Bank of Pennsylvania*, 4 How. 567.

100. Testimony before the committing magistrate, is not evidence on the trial of the prisoner. *Oliver v. The State*, 5 How. 14.

101. The minute book of the court is not evidence of the judgment; the whole record, writ, pleadings and judgment, must be produced. *Lehr v. Hall*, 5 How. 54.

102. Where an execution is proved to have been lost, it is admissible to read the minutes made on the execution docket, which stated the issuance of the execution and the return thereon. *Ib.*

103. See *Forthcoming Bond*, 15; how far parol evidence admissible to show authority to fill up blanks in forthcoming bond.

104. The certificate of the clerk of the high court of errors and appeals, that a judgment has been reversed, is admissible in evidence of that fact. *Hoy v. Couch*, 5 How. 188.

105. See *Instruction*, 11; as to power of court to charge jury on weight of evidence, and for failure of evidence to find for defendant.

106. See *Franchise*, 1-3. What evidence is necessary to support

action for disturbance of franchise, and to prove damages.

107. To constitute error in ruling out testimony, its relevancy must appear; to reject mere cumulative evidence will not be error; and where the bill of exception recites that testimony was introduced, without setting out what it was, it will be presumed to have upheld the judgment below. *Townsend v. Blewett*, 5 How. 503.

108. See *Judgment*, 61; how far reversed judgment evidence to justify the action of the plaintiff therein before his judgment was reversed.

109. Where evidence, written or oral, is rejected in the court below, exceptions to its rejection will not be regarded, unless the party excepting embody the evidence rejected in a bill of exceptions, that the court may consider of it. *Harris v. Newman*, 5 How. 654.

110. Where evidence was objected to as incompetent, but the party afterwards waived the objection and agreed that the "evidence should go before the jury for what it was worth," he cannot be heard afterwards to object to the verdict on account of the admissibility of such testimony. *Carter v. Graves*, 6 How. 9.

111. The objection to the competency of a witness may be made at any time before the case is submitted to the jury, by instructions from the court to disregard the testimony of such supposed incompetent witness. *Ib.*

112. See *Bills of Exchange and Promissory Notes*, 84; how far identity of instruments as part of the same contract, a question of fact for the jury.

113. The account of a defendant with the bank at which he has had

discounts is competent evidence to show the rate of interest reserved, and may be established by the cashier, or proved by showing that it was correctly copied from the books of the bank, or by showing the clerk's handwriting. *Forniquet v. West Feliciana Railroad Co.* 6 How. 116.

114. See *Chancery*, tit. *Answer*; when answer of defendant, evidence against his co-defendant.

115. In an action of assumpsit by E. against S. as sheriff, for money collected on execution of E. against H., it is not competent for S. to introduce as evidence the record of a judgment in favor of N. against H., in order to show that the money made on the execution in favor of E. against H. was appropriated to the execution in favor of N. against H., E. having been no party to that judgment. *Englehard v. Sutton*, 7 How. 99.

116. If the court permit improper evidence to go to the jury, it seems the error will not be cured by afterwards instructing the jury to disregard it. *Ib*; *sed contra*, *Carter v. Graves*, 6 How. 9; *quod vide*.

117. See *Garnishment*, 9, 10; what is evidence on trial of issue contesting truth of garnishee's answer.

118. See *Banks*, 14; what evidence of custom may be adduced.

119. A judgment is evidence only between parties and privies; but where a suit was brought in the name of A. for the use of B., with the knowledge of A., the judgment in that suit will be evidence in a suit between A. and B.; whether conclusive or only *prima facie* when offered as evidence. *Quære?* *Cartwright v. Carpenter*, 7 How. 328.

120. Cumulative evidence is ad-

ditional evidence to support the same point, and which is of the same character with evidence already produced; the fact that it tends to prove the same proposition does not make it cumulative; therefore where a suit was brought on a bill of exchange, the execution of which was denied under oath by the defendant, and two witnesses testified on the trial that the defendant was in Tennessee when the bill was drawn, purporting to be drawn in this state, testimony of a witness who was present when the bill was drawn, that the defendant was not there, and his name was signed by another party is not cumulative. *Varde-man v. Byrne*, 7 How. 365.

121. See *Chancery*, 121; for the weight of answer to bill of discovery.

122. Although a justice of the peace might not be permitted to falsify his own certificate; yet, if when called on to explain the manner in which his certificate was obtained, and he shows facts which will invalidate it, his testimony will be competent. *Wood v. American Life Insurance and Trust Company*, 7 How. 609.

123. Identity may be established by circumstantial as well as positive proof; where, therefore, an action was brought for harboring a slave, and one witness described the slave, it was *held* competent to ask another witness if he had seen a slave answering that description on the plantation of the defendant. *Suzett v. Buckels*, 7 How. 663.

124. Where a note and certificate of stock correspond exactly as to dates and amounts, and there is no other proof of the consideration of the note, that exact cor-

respondence, if left unexplained by the other party, is sufficient basis to uphold the finding of the jury, that the certificate of stock formed the consideration of the note. *Barringer v. Nesbit*, 1 S. & M. 22.

125. See *Fraud*; when sub-vendee may set up fraud of first vendor.

126. The court cannot judicially know the law of a foreign state; it must be proven as a fact to the court. *Martin v. Martin*, 1 S. & M. 176.

127. Where testimony is addressed to the court, objections to competency are not entitled to the same weight that they would be if the testimony were addressed to a jury. *Clark v. Kingsland*, 1 S. & M. 248.

128. See *Warranty*, 8, for what evidence will uphold verdict of breach of warranty.

129. On the trial of a prisoner for selling liquor contrary to the statute, the statement of a bystander at the time of sale, "that the prisoner did let the negro man have the whiskey" although made in the presence of the prisoner, is not evidence, the bystander should be produced. *Noonan v. The State*, 1 S. & M. 562.

130. On the trial of a person for a violation of the statute regulating the mode of obtaining license to sell spirituous liquors, it is not material to the proof of spirituous liquors, to charge its particular kind by name; or to the proof of a person being a slave to whom the liquor was sold, to aver his master's name. *Ib.*

131. The evidence under the plea of *autre fois acquit* or *convict* is not exclusively of the record; but may be oral to the extent

required under the circumstances. *Ib.*

132. See *Bills of Exchange and Promissory Notes*, 120; for what evidence of price of cotton, given in part payment of note, is admissible.

133. See *Bank*, 21; whether in a suit by a bank on a note payable to itself, the value of the note can be proved by way of diminishing the amount of the recovery.

134. The signature to a note in these words, *viz.* "C. G. Robertson, guardian; H. D. Robertson, guardian, right of my wife, C. G. Robertson," affords no legal inference that the C. G. Robertson, signing the note is the same C. G. Robertson, who is the wife of H. D. Robertson. *Robertson v. Banks*, 1 S. & M. 666.

135. Mere silence of the vendor of land when charged with the concealment of an incumbrance, is not sufficient evidence of a fraudulent concealment to justify a rescission of the contract. *Halls v. Thompson*, 1 S. & M. 443.

136. It is for the jury and not the court to show presumptions from the facts proved. *Dickson v. Moody*, 2 S. & M. 17.

137. Where a witness has testified in the magistrate's court in a case of assault, and also in the circuit court in the same case; it is competent to introduce the justice before whom he testified first, to prove by him that the written statement of the witness taken before him had been lost, and also to prove what he testified to before him, in order to impeach his testimony; the justice of the peace not being bound either to preserve or send to the circuit court the evidence taken in writing by him. *Pearce v. Furr*, 2 S. & M. 54. Yet if the written state-

ment be in existence and its absence be not accounted for, the justice cannot testify. *Peter v. The State*, 4 S. & M. 17.

138. Under an issue whether a payment alleged to have been made by the transfer of a note, was valid, which note, the replication averred, had been transferred in fraud by the defendant, who falsely and fraudulently withheld the knowledge from the plaintiff that nothing was due on the note, it was held competent to show that nothing was due on the note before it was transferred; such transfer with the concealment of that knowledge being fraudulent. *Hoopes v. Newman*, 2 S. & M. 71.

139. See *Bills of Exchange and Promissory Notes*, 127; letter of indorser evidence for consideration of jury.

140. See *Bills of Exchange and Promissory Notes*, 129; an administrator who is defendant, is an incompetent witness, unless the administrator will come into court and express his willingness to testify.

141. Where a loss has happened to insured property and a correspondence ensues between the insured and the insurers as to the extent of loss, and the mode by which it shall be ascertained and adjusted, and the insurers state that "they are to be liable for all damages sustained by a peril of the river;" and the parties cannot agree on a settlement; in a suit for the loss, the parties are remitted to their original rights unaffected by the negotiations for settlement. *Natchez Insurance Company v. Stanton*, 2 S. & M. 340.

142. See *Bills of Exceptions*, 19; when evidence must be set out in, and when it need not be.

143. A certificate of the register

of a land-office, is evidence of title under the statute of this state. *Robinson v. Parker*, 3 S. & M. 114.

144. Where the parties to a suit, have agreed upon the facts, and for the purpose of using that agreement as evidence have reduced the same to writing, they are concluded by it from introducing any evidence to vary or contradict the agreed state of facts. *Morgan v. Reading*, 3 S. & M. 366.

145. The answer of the principal obligor, to a bill of discovery filed against him, is evidence against his co-obligors though his mere sureties, where they are all sued jointly. *Montgomery v. Dillingham*, 3 S. & M. 647.

146. A party is not bound to adopt any particular order in the introduction of his testimony; therefore, where to an action on a bond with conditions, payment was plead, and the defendant asked a witness "if the plaintiff had not sold the defendant some property, and for how much, and how much had been paid;" and the court refused permission to the witness to answer; *held*, that the question was pertinent, and should have been answered, as the payment of a bond might be proved by parol. *Tinnin v. Garrett*, 4 S. & M. 207.

147. It is not necessary that evidence offered should appear at the time it is offered to be relevant, it is sufficient if its relevancy appear at any time before the case is closed. *Lake v. Munford*, 4 S. & M. 312.

148. Wherever an instrument offered as evidence in a civil suit, differs so little from that described as not to be likely to produce any detriment to the opposite party, either in the then pending, or any future controversy, the evidence

as a general rule, should not be excluded; therefore, in a motion against a sheriff and his sureties, an execution differing from that described in the notice, by the amount of sixty-two and one-half cents in the statement of costs, should not be excluded as evidence; in any event the court ought to allow an amendment of the notice so as to make them correspond. *Fulcord v. Hamberlin*, 4 S. & M. 649.

149. A witness under *subpœna duces tecum* is compelled to produce all documents in his possession, unless he have a reasonable excuse to the contrary; of the validity of which excuse the court and not the witness, is to judge. *Chaplain v. Briscoe*, 5 S. & M. 198.

150. See *Bills of Exchange and Promissory Notes*, 156; the affidavit of the plaintiff of the loss of a note, is a foundation for the admission of secondary evidence; but is not evidence itself.

151. In an action of ejectment, the boundary of the property in controversy is always provable by parol. *Surget v. Little*, 5 S. & M. 319.

152. In an action of ejectment, the survey of the premises in controversy, made prior to the institution of suit, even though made by order of court, in another suit, between other parties, is not admissible in evidence; so a private survey, made *ex parte*, is inadmissible. *Ib.*

153. Copies of the official maps of the surveys of the lands in this state, deposited in the surveyor-general's office, are the best evidence of the extent, character, and boundaries of such surveys, and therefore parol evidence that a private survey conforms to such offi-

cial survey, without producing the copy of the official survey, is improper. *Ib.*

154. On the trial of a prisoner for alleged forgery of auditor's warrants, besides the proof of the handwriting of the prisoner, there being no positive proof of the forged warrants having been seen in the possession of, or uttered by the prisoner, the state proved that he was the clerk of the auditor, had official custody of his books, free access at all times to the registry, and that the forged warrants, in all material respects, corresponded with the genuine ones in the register; upon which the prisoner proposed to prove that the registry was not always, or generally, in his custody, but was carelessly thrown about the office, accessible to all who might casually enter it, and often, with the auditor's office itself, for a considerable time in the care of a single servant; *held*, that the testimony offered by the prisoner was proper rebutting testimony, and should have been admitted. *Pagaud v. The State*, 5 S. & M. 491.

155. In an action by the sheriff to recover the price bid for real estate at its sale, the return on the execution is evidence for him, but his memorandum books would not be. *Hand v. Grant*, 5 S. & M. 508.

156. D. being indicted and on trial for the murder of a slave, and it being proved that D. was acting in the capacity of overseer for B., a witness was permitted, though objected to by the prisoner, to testify on the part of the state, as to the prisoner's general habit, as overseer, in punishing slaves on the plantation of the owner of the slave killed; *held*, that the evidence was inadmissible, being calculated

to prejudice the jury against the prisoner, and not being responsive to any charge made. *Dowling v. The State*, 5 S. & M. 664.

157. See *Judgment*, 123; a decree in chancery, without the previous proceedings, is inadmissible in evidence.

158. Where the defendant filed a bill of discovery against the plaintiff, requiring him to state whether or not certain alleged payments had been made on the note in suit, and the petition was neither answered nor taken for confessed, the defendant had a right to abandon the petition, and introduce a witness to prove the payments; especially where it appears that the evidence has come to the party's knowledge since the petition was filed. *Foster v. Pinckard*, 5 S. & M. 792.

159. Where a defence is based upon the provisions of a statute of another state, in order to make the defence available the statute must be produced, and proved. *Hemphill v. The Bank of Alabama*, 6 S. & M. 44.

160. See *Sheriff*, 53; the advertisements of his sale, though signed by his deputy, are evidence against the sheriff, in an action by the publisher of a newspaper against the sheriff, for the costs of such advertisements in the publisher's paper.

161. Where, in an action by a bank to recover the amount of a note payable to itself, the defendant proved that he had delivered to his counsel, to use in evidence, the receipt of the bank for a certain amount of cotton, and that the receipt had been lost, and offered to prove its contents; *held*, that a sufficient foundation for the secondary evidence had been laid, and it should be admitted; and *held*, fur-

ther, that the delivery of the cotton, in payment of the debt, might have been established by any other proof, without producing, or accounting for the receipt. *Smith v. The Mississippi and Alabama Railroad Co.* 6 S. & M. 179.

162. See *Partner*, 28. Evidence from circumstances, to establish partnership, ought to be admitted, where it is denied under oath.

163. Where articles of partnership are lost, though they refer to a tract of land, parol evidence of their contents is admissible. *Perry v. Randolph*, 6 S. & M. 335.

164. D. & R. being partners in a race-course, D. sold out his interest to G., who assumed to pay D.'s share of the debts due on account of the course; in an action against D. & R. by P., for work done on the course, *held*, that G. was an incompetent witness to prove payment by D. to P., for the work done by P. and for the value of which he was suing. *Ib.*

165. See *Agent*, 13; where a defendant, sued as principal, on a note made by an agent, permits the note to be read, *without objection*, to the jury, (though he has denied the agency under oath) he thereby admits the due execution of the note by the agent, within the scope of the agency.

166. See *Contract*, 59; when a bank sues on a contract for a loan on which the defendant has paid cotton, to be shipped to Liverpool, what evidence of the value of the cotton is admissible, and what of the depreciation of the bank's notes.

167. No tribunal has authority to take proof, except in a case before it, or by authority expressly conferred by commission, or by statute. *Merrill v. Bell*, 6 S. & M. 730.

168. If the answer of a defendant to a bill in chancery be made a cross-bill; the answers of the original complainant to the interrogatories propounded in the cross-bill are good evidence in favor of the complainant. *Money v. Dorsey*, 7 S. & M. 15.

169. Where, on an application to the probate court to remove an executor for maladministration, oral testimony was given, but not taken down at the time, the executor having time given him until the next term to reduce it to writing; and after the decision of the court removing the executor, he had the witnesses re-examined before a justice of the peace, and their testimony taken down, and the clerk of the circuit court certifies to the correctness of the transcript of the evidence; *held*, that the high court of errors and appeals could not notice the testimony; it was irregular to re-examine the witnesses after the trial; the evidence under the statute should have been taken down and recorded at the time. *Ross v. Mims*, 7 S. & M. 121.

170. Where the validity of the certificate of a state officer is called in question, its conformity to law is a question of law for the court, being regulated by a public law of the state; but the conformity of the certificate of a foreign officer to the foreign law, is a question of fact, to be established by evidence. *Sessions v. Reynolds*, 7 S. & M. 130.

171. Where a certificate of a foreign officer is made, the certificate is *prima facie* evidence of its conformity to law; and it devolves on him who questions its admissibility, to show that it is not in the usual form, to do which he must

produce an authenticated copy of the foreign law, or, if that cannot be had, the best evidence which the nature of the case admits of. *Ib.*

172. Where the court below rejects proof of a particular fact, which fact can only be established in a particular way, the record must show that the proof rejected was pertinent to the establishment of the fact in that particular way; where, therefore, the bill of exceptions recited that "the defendant offered to prove" that the certificate of the foreign officer was not in due form, without showing how, or by what proof, and the court below rejected the proof, *held*, that the high court would presume it was correctly rejected. *Ib.*

173. The duly authenticated copy of a plat and survey of lands contained in a confirmation of a Spanish grant, from the office of the surveyor-general of lands, south of Tennessee, is evidence under the statute, nor will the fact, that in the certificate of authentication the surveyor-general puts no date, make any difference; he certifies as surveyor-general, and the presumption is, the certificate is true, until the contrary is shown; nor will the fact that the copy of such survey, from the surveyor-general's office, differs materially from the map of the same land in the register's office, exclude the former from testimony; both copies are testimony under the statute, and of equally high grade; the mistakes in the maps can only be corrected by actual surveys. *Ib.*

174. Under the statute of this state, which declares "that where the parties or witnesses to a deed reside in a foreign kingdom, &c. the acknowledgment or proof made before any court of law, or mayor,

&c. certified by the same court, mayor, &c., in the manner such acts are usually authenticated by him or them, shall be sufficient, &c.;" an acknowledgment to a deed, purporting to have been taken before the mayor of Liverpool, and to be his official certificate, and which bears the corporate seal, but which is not signed by that officer, but by the town clerk, is sufficient; the rule being that the certificate of a foreign officer is *prima facie* in due form, or in the usual form of authentication, but not conclusive. *Ib.*

175. It is a principle of evidence, that where two writings refer to each other, with a view to the construction of either, being contemporaneous and kindred in respect to subject-matter, they are deemed one instrument, when the controversy is between the original parties, or their representatives; where, therefore, a deed, conveying the absolute fee in real estate, was executed, and at the same time the grantee executed a paper, reciting that he received the property charged with the settlement of the just debts of the grantor; *held*, that the latter paper was correctly admitted in evidence, in an action of ejectment by the grantee of the deed, against the widow of the grantor, to show that the grantee had but a trust in the property, and that the widow was entitled to dower therein. *Caillaret v. Bernard*, 7 S. & M. 316.

e. *Notarial Certificates and Evidence.*

176. The memoranda of a deceased notary, of the protest and notice to the indorsers of a promissory note, though not made out according to the statute, are evidence

of the protest and notice before the jury; nor will their validity be affected, if they are not entirely in his handwriting, if signed by him. *Barnard v. Planters Bank*, 4 How. 98; *Bodley v. Scarborough*, 5 How. 729.

177. The construction of memoranda of a deceased notary, is for the jury; where a notary had therefore written the word "office" on his record, opposite the indorser's name, and underneath added *that the notices were duly served on the proper day, by nine o'clock in the morning, according to the designation specified above*, and the jury found for the plaintiff; *held*, that there was sufficient to uphold the verdict, as by office might have been meant the indorser's office, which he was proved to have had in the city, where the note was protested. *Ib.* 4 How. 98.

178. See *Bills of Exchange and Promissory Notes*, 65. What notarial records are evidence.

179. A notarial record sworn to by the notary, *to the best of his knowledge and belief*, is sufficiently verified to be evidence under the statute. *Harris v. Heberton*, 5 How. 575.

180. See *Bills of Exchange and Promissory Notes*, 65; for impeachment of notary's certificate, by inquiry as to particular facts.

181. See *Bills of Exchange and Promissory Notes*, 127. Construction of notary's memoranda is for jury; and his clerk cannot testify what notary intended.

182. In an action against the indorser of a note, the notary's deposition was read, by the plaintiff, to prove the protest and notice; and the defendant read another deposition of the same notary, taken a year previous, about the same note,

in which last deposition he differed in his statements from those in the other, about the mode of giving notice ; when the plaintiff proved that when his first deposition was given his notarial books were lost, and the notary testified, from recollection, when the second was taken they were found, and the notary had refreshed his memory from them ; *held*, that it was competent for the defendant, by way of rebutting this proof, to prove the notary's general habit, in keeping his notarial record, and that he was in the habit of leaving his memoranda of notices of protest, in blank, to be filled up afterwards. *Seltzer v. Fuller*, 6 S. & M. 185.

f. Parol Evidence, when admissible to vary or explain writing, &c.

183. Parol evidence is not admissible to show a mistake in the quantity of acres mentioned in a deed where no fraud is proved ; a contract cannot rest partly in parol and partly in writing ; the parol is extinguished by the writing ; articles of agreement consummated by a deed, are merged in it, and become a nullity ; nor can a different consideration from that stated in a deed be established by parol. *Kerr v. Calvit*, Walk. 115.

184. Where a person buying a claim, which the parties suppose to contain four hundred acres, and for which he agrees to pay ten dollars per acre, for that number of acres, yet receives a deed calling for only two hundred and fifty acres, more or less, he cannot set up a failure of consideration when sued for the purchase-money, by proving by parol the purchase of the four hundred acres, if there was no fraud on the part of the vendor. *Id.*

185. In an action on an injunction bond to enjoin a judgment at law, which bond recited that "whereas, at a circuit court of law held in and for the county of Wilkinson, on the first Monday in November, 1822, the above-named C. H. . . . and whereas the said S. G. hath prayed for, and obtained an injunction to stay the proceedings upon said judgment at law, until, &c." it was *held*, that the bond was void for uncertainty, and that it was incompetent for the plaintiff to show, by parol, that the judgment at law referred to, was one in favor of J. D. for the use of C. H. against said S. G., at the May term, 1820, of said court. *Gildart v. Howell*, 1 How. 198.

186. The grantor, in a bill of sale, may be permitted to explain the nature of the bill of sale, where there is an ambiguity in it, and to show that he is a mere trustee with limited power to sell. *Berry v. Hale*, 1 How. 315.

187. F. conveyed land to C., and described it thus : namely, "containing two hundred and forty acres in the county of W. on the B. S. waters ; bounded on the north by the lands of R. D., east by lands of said F., south by lands of said C., and west by the west branch of B. S. creek." *Held*, that it was incompetent for F. to show, by parol, that he only designed to convey to C. a certain tract of one hundred and fifty-three acres, which tract of one hundred and fifty-three acres C. had admitted, in conversations, was what he bought, but which did not, in metes and bounds, answer the description called for in the deed, nor in its amount. *Carmichael v. Foley*, 1 How. 591.

188. To allow the introduction

of parol testimony to explain a written grant, on the ground of a latent ambiguity, there must be two subjects to which the description in the grant will equally apply; it will never be permitted to defeat a more material and applicable description, in favor of one neither so material nor applicable to the grant; parol evidence is never admissible, where the deed can have an effective operation without it. *Ib.*

189. Parol evidence cannot be admitted of a sale by an administrator, even though offered by such administrator; the deed must be produced. *Randolph v. Doss*, 3 How. 205.

190. Where a bill of sale is given for two negroes, with warranty, and an action is brought on an alleged breach of the warranty as to one, it is competent to show, by parol, the price agreed on at the time of sale for each negro, though the bill of sale specify a single sum as the price of the two. *Tutt v. McLeod*, 3 How. 223.

191. It is improper to prove by oral testimony the existence of a patent; if the officer who has possession of it refuse to deliver it, a *subpœna duces tecum* should have been applied for. *Wooldridge v. Wilkins*, 3 How. 360.

192. The survey of the land is to be taken as part of the patent, and may be resorted to to control the calls of the patent; and if the survey show an artificial or natural boundary that can be well ascertained by marked trees or otherwise, it will prevail, and parol evidence is admissible to establish it, even though it vary from the course or distance called for, it will nevertheless be taken as the true bound-

dary; yet all lines on the survey are not conclusive evidence that the line was run; therefore where a dotted line occurred in a survey, it was held competent to show, by parol, that the line never was actually run, and that surveyors used dotted lines to indicate lines that were never run. *Newman v. Foster*, 3 How. 383.

193. Where there had been a sale of real estate by the plaintiff to the defendants, and partial payments made, and the contract afterwards rescinded, and a short memorandum thereof made, in which nothing was said about the money paid, it was held, in a suit on a note given to the plaintiff as part of the compromise, to which the defendant plead as an offset the money paid on the land, that it was competent for the plaintiff to show, by parol, that in the compromise it was agreed that that money should not be recovered back; and the admission of the defendant to that effect, would be evidence against him. *Clark v. Perry*, 4 How. 285.

194. It seems parol evidence is admissible to show an absolute bill of sale to be a mortgage; and also to show an extension of time to redeem in, and an increase of the mortgage debt. *Kent v. Allbritain*, 4 How. 317.

195. A receipt may be explained, and even contradicted, by parol proof; where, therefore, a sheriff gave a receipt for the debt to the defendant, in the execution, it was held competent to show by parol what kind of funds was paid, or that no money at all was paid. *Gasquet v. Warren*, 2 S. & M. 514.

196. See *Chancery*, 5; a written instrument, where from mistake or fraud it does not truly show the intent of the parties, may be ex-

plained by parol and the true intent shown, in equity.

197. The rule of law that parol testimony cannot be heard to vary written agreements, has never been carried so far as to defeat the right to prove a failure of consideration. *Buckels v. Cunningham*, 6 S. & M. 358.

198. Where a bond was payable on its face to B., it seems it is a matter of doubt whether it would be admissible in a court of law to prove that the obligation did not originally belong to B., but to a bank. *Lanier v. Trigg*, 6 S. & M. 641.

199. The parol declarations of the grantor in a deed, that he had previously, by deed, conveyed away the same property, are inadmissible in evidence, in a suit by the grantee in the last deed against the alleged grantee in the first; the deed must be produced, or if lost, its existence established. *Harmon v. James*, 7 S. & M. 111.

200. Where A. draws a bill on B., in favor of C., and B. accept the bill in writing, and is sued upon it, he cannot show by parol evidence that the acceptance of the bill was given to C. to be obligatory upon condition that A. finished a job of work that he had undertaken for B. *Heaverin v. Donnell*, 7 S. & M. 244.

201. In an action on a note given for land, in which the defendant offered proof of want of title in the plaintiff to the land, it is not competent for the plaintiff to show by parol that there was a mistake in the description of the land in the title bond, and that the defendant was really put into possession of the land sold, and had been ever since in possession; such proof may be made in a court of equity, not

of law. *Peques v. Mosby*, 7 S. & M. 340.

202. Parol evidence to supply omission in the description of land in a deed which would be otherwise void for uncertainty, is inadmissible. *Wilkinson v. Davis*, Freem. Ch. 53.

203. Parol evidence to explain or vary the terms of written instruments is received with great caution and distrust, yet such evidence is admissible to explain mistakes in a deed, and it seems it is admissible to show by parol that a deed of trust to secure judgments against H., was not also intended to secure judgments against H. & P. *Lauderdale v. Hallock*, 7 S. & M. 622.

g. Witness; who competent, and what disqualifies.

204. A prosecutor in an indictment is a competent witness for the state upon the trial, though liable for costs in the event the prosecution fail, if it appear to be frivolous or malicious. *The State v. Blennerhassett*, Walk. 7.

205. Nothing but infamy of character, or an absolute and direct interest in the event of the suit, or the admissibility of the verdict and judgment, in the suit in which he is to testify, against him in some future trial, will disqualify a witness. *Ib.*

206. Where two defendants are tried together, on indictments for the same assault and battery, one of the defendants is not a good witness for the other upon the trial, unless no proof of guilt be offered against the defendant proposed as a witness. *Ib.*

207. The interest which renders a witness incompetent must be direct and positive, and in the event of the suit; if he believe he is interested in it, that belief disqualifies him though the fact be otherwise,

unless he believe his interest merely one of honor; if the verdict may be used against him in other suits, he is incompetent though called to testify against his interest; so, if insane, an idiot, a lunatic, an atheist, a disbeliever in rewards and punishments hereafter, convicted of an infamous offence, or interested in the event of the suit. *Phebe v. Prince*, Walk. 131.

208. A plaintiff cannot be a witness to sustain his accounts by his own book of accounts. *West v. Poindexter*, Walk. 303.

209. See *Partners*, 2; as to whether one partner can ever be a witness for the other in partnership matters.

210. See *Executor and Administrator*, 20; as to how far witness may be compelled to testify, though he subject himself to civil suit thereby.

211. A member of an incorporation who will be liable to pay his share of the costs of a suit brought by the company, is not a competent witness for the company; but where there has been a sum apparently sufficient to cover costs deposited, and he has executed a release of his interest, his liability to pay his portion of any further costs that might accrue, is too remote to disqualify him, and he will be competent. *Smith v. Natchez Steamboat Co.* 1 How. 479.

212. A trustee who is also one of the *cestui que trusts* in a deed, cannot become a competent witness for his co-trustee by releasing his interest under the deed and his office as trustee; he cannot renounce the latter without the assent of the beneficiaries in the deed, or the permission of a court of equity. *Ferriday v. Selser*, 4 How. 506.

213. The drawee who has re-

fused to accept the bill is a competent witness for either party in an action on the bill against the other parties; and where he was present in court ready to testify, evidence *aliunde* of his statements would not be competent. *Carmichael v. Bank of Pennsylvania*, 4 How. 567.

214. A mere interest in the question involved in the suit will not render a witness incompetent; therefore in an action to try the right of property to a slave levied on by attachment, a plaintiff in another attachment suit involving the title to the same slave will not be an incompetent witness for the plaintiff in the first suit;

215. Nor will he be rendered incompetent by reason of an agreement on the part of the counsel for him in his suit, that his suit should abide the issue of the one he was to testify in; as such agreement would not be binding on him. *Clapp v. Mandeville*, 5 How. 197.

216. If a witness, by his own voluntary act or by the procurement of the party who objects to him, has acquired an interest in the verdict after the event, he is called to prove, has happened, the other party shall not for that reason be deprived of his evidence. *Ib.*

217. In an action on a note against the makers and indorsers under the act of 1837, one of the makers is not a competent witness to prove that time had been given to the makers so that the indorser was released, nor to prove that a new note had been given in payment of the note sued on. *Wade v. Staunton*, 5 How. 631.

218. A distributee is an incompetent witness to establish a sale by which the distributive fund will be increased; nor will that interest be counterpoised by the fact that such

distributee was the vendor in the sale, and if the sale were not established, the property sold would be subject to the payment of the vendor's debt. *Carter v. Graves*, 6 How. 9.

219. The master is a competent witness for his slave in a state prosecution. *Isham v. The State*, 6 How. 35.

220. It seems that all persons not interested in the event of the suit, nor incapacitated by his religious tenets, nor by the conviction of an infamous crime, are competent witnesses; other circumstances only affect their credit; the maker of a note, therefore, against whom a judgment has been rendered is a competent witness, when the indorser is sued, to prove a payment. *Routh v. Helm*, 6 How. 127.

221. See *Bills of Exchange and Promissory Notes*, 114; whether a joint maker of a note is a competent witness for his co-maker.

222. A witness is not incompetent when his interest is against the party calling him. *Morton v. Jackson*, 1 S. & M. 494; much less is he so if the party calling him offer to release the interest. *Englehard v. Slater*, 7 How. 538.

223. An agent as a general rule is not only competent to establish a parol authority, but also to prove the contract; a witness, therefore, who, on his *voir dire*, stated that he was not interested in the event of the suit, that he did not know whether, if the plaintiff succeeded, he should be liable for the amount recovered or not, that he had acted as agent for the defendant, was held a competent witness; interest only disqualifies an agent. *Austim v. Feamster*, 1 S. & M. 166.

224. The surety in an attachment bond is a competent witness

for the plaintiff in attachment, upon the trial of an issue taken on the answer of the garnishees of the defendant in the attachment. *Peters v. Moss*, 1 S. & M. 331.

225. An attorney at law, who made an assignment of a judgment belonging to his client for whom he was under acceptances to be paid out of moneys that he might collect, is a competent witness to prove the circumstances under which he assented to the assignment and to testify generally with reference to it. *Clarke v. Kingsland*, 1 S. & M. 248.

226. The grantor in a deed under whom the lessor of the plaintiff claims, is a competent witness for the defendant in the ejectment to show what was meant by a descriptive word in the deed, or to explain any doubt or ambiguity connected with the description of the boundary; where, therefore, land was in part described as "designated more particularly on the map of said town, as 'swamp land,'" it was held, there being no land designated on the map as *swamp land*, it was competent to show by the grantor in the deed what was intended by that phrase. *Morton v. Jackson*, 1 S. & M. 494.

227. In the trial of the right of property levied on under execution, the sureties in the claimant's bond are incompetent witnesses in his behalf; but the claimant has a right to substitute new sureties so as to discharge the old; and it will be error to refuse it; but if such sureties are disqualified from other causes, it will not be error to refuse the change. *Ib.*

228. Where a suit was brought in the name of one for the use of another, the nominal plaintiff, when his testimony is against himself, is

a competent witness though objected to by the usee if he do not himself object to testify. *Smith v. Elder*, 7 S. & M. 507.

229. In a controversy between two sureties on a note for contribution, the principal being equally liable to both, stands indifferently between them and is a competent witness. *Hunt v. Chambliss*, 7 S. & M. 532.

230. Where a party holding a bond for title to land assigns it to another without any covenant on his part, and the same land is sold under an execution against the assignor of the bond, in a controversy between the assignee of the bond and the purchaser at the sale under the execution, the assignor of the bond is an incompetent witness to prove that he assigned the bond without any consideration and in fraud of his creditors. *Ellis v. Ward*, 7 S. & M. 651.

231. An administrator who is also the son of his intestate is not a competent witness to prove that his intestate did not execute a note upon which it was attempted to render him liable; nor is an administrator who revives a suit of a deceased complainant a competent witness on behalf of his intestate, because he is liable for costs. *M^r. Intyre v. Ledyard*, 1 S. & M. Ch. 91.

232. A defendant charged with colluding with his co-defendant in regard to the transaction sought to be impeached cannot be a witness for his co-defendant, especially where he is liable for costs. *Pope v. Andrews*, 1 S. & M. Ch. 135.

233. In a joint action against makers and indorsers of a note one indorser is not a competent witness for another indorser sued in the same case, being liable for

costs. *Scott v. Watkins*, 2 S. & M. 233.

234. A partner is not a competent witness for his co-partner unless they mutually execute general releases to and from each other; therefore the drawer of a bill is not a competent witness for the acceptor when it appears that the drawer was a partner of the acceptor in the bill sued on, even though the acceptor execute to him a release of interest. *Scott v. Watkins*, 2 S. & M. 255.

235. Since the act of 1829 Indians are competent witnesses in any case where a white man would be. *Harris v. Newman*, 3 S. & M. 565; *Coleman v. Tishomah*, 4 S. & M. 40.

236. In a suit against some of the members of an unincorporated banking company, one of the members of that company, who had been so from the commencement, is a competent witness for the plaintiff in the suit. *Lake v. Munford*, 4 S. & M. 312.

237. In the trial of the right of property in slaves levied on under execution where the claimant is a *feme covert*, her husband is not a competent witness to testify in her behalf. *Moore v. M^r. Kie*, 5 S. & M. 238.

238. A father who has made a deed of gift of slaves to his daughter, with warranty for the consideration of love and affection and of ten dollars cash paid, is a competent witness in her behalf in a trial of right of property between the plaintiff in an execution against her husband who had levied on the slaves, and the daughter who was claiming them; for, though as a general rule the grantor or vendor with warranty is an incompetent witness for the grantee or vendee, yet it may be shewn by parol that the pecuniary

consideration expressed in the deed was merely nominal and that it was actually a deed of gift. *Ib.*

239. A vendor of land who has taken a deed of trust to secure himself the purchase-money, is not a competent witness for the vendee when the sale is attacked as fraudulent, to prove its fairness, or to testify in relation to it, he being directly interested in upholding the sale in order to enforce payment of the notes secured by the deed of trust." *Ib.*

240. As a general rule, an agent is a competent witness for, as well as against his principal; but where a judgment in favor of the party calling him will procure a direct benefit to himself he is incompetent. *Poindexter v. La Roche*, 7 S. & M. 699.

241. L. filed a bill against P. to foreclose a mortgage; P. answered that he had paid the debt secured by the mortgage, to W. the agent of L., and to whom, as agent, the mortgage was executed and the notes secured by it given; L. offered to prove by W. that the money paid by P. to him had been applied by W., without consulting P. to the payment of a debt which P., owed W. in his own right, and not to the payment of the debt secured by the mortgage; *held*, that W. was an incompetent witness in relation to his individual transaction with P., as he would by his testimony secure the payment of his own demand, and release himself from liability to his principal by charging P. *Ib.*

EXECUTION.

See *Forthcoming Bond, Sheriff, Judgment — passim.*

1. An execution on a judgment, the defendant in which has died since its rendition, which issues after the death of the defendant, against his administrator without revival by *scire facias*, and after the lapse of a year and a day from the rendition of the judgment against the intestate, is irregular. *Hicks v. Murphy*, Walk. 66; *Hubert v. Williams*, *Ib.* 175.

2. Such irregularity cannot be taken advantage of by writ of error, but only by motion or writ of *audita querela* in the court below, unless the execution has issued by order of such inferior court. *Ib.*

3. An execution cannot issue, after his death, against the effects of a deceased person, before a revival of the judgment against his legal representatives. *Wilson v. Kirkland*, Walk. 155; if the execution bear *teste* after the death of the defendant, and before revival, it will be quashed on motion; and if one execution issue, and defendant die before levy, and the execution is returned, a revival of the judgment is necessary before another can issue; and if one out of several defendants die before execution is issued, it must be issued against all; but can be levied only on the property of the survivors. *Davis v. Helm*, 3 S. & M. 17; but it seems a sale under execution against a dead man, would be voidable only. *Smith v. Winston*, 2 How. 601; *Drake v. Collins*, 5 How. 253.

4. The mortgagor's, but not mortgagee's interest in land and slaves subject to sale under execution in this state. *Hunter v. Hunter*, Walk. 194; but the right of the grantor in a deed of trust of personal property is not; and it seems equities and rights to redeem are

not at common law, and are not made so by our statute. *Thornhill v. Gilmer*, 4 S. & M. 153.

5. On a judgment revived by *scire facias*, the execution should issue on the original judgment. *Eastin v. Vandorn*, Walk. 214.

6. See *Forthcoming Bond*, 2; as to quashing execution on, because of the omission to make money out of levy on original judgment.

7. Sale under execution does not divest dower. *Fleeson v. Nicholson*, Walk. 247.

8. Payment to the clerk of the court is no satisfaction of the judgment or execution. *Lewis v. Johnson*, Walk. 260.

9. See *Arbitration*, 1; as to issuance of execution on award.

10. See *Trustees of Poor*, 1; as to power of legislature to stay execution.

11. An injunction does not destroy the lien of the judgment enjoined; nor will a sale on the junior judgment, pending the injunction, affect the lien of the elder judgment. *Lynn v. Gridley*, Walk. 548.

12. See *Forthcoming Bond*, 5; as to quashing execution on, for defects in bond.

13. See *Forthcoming Bond*, 6; for objections to executions on original judgment, after forfeiture.

14. Execution no part of record unless embodied in bill of exceptions. *Davis v. Baldwin*, 1 How. 550.

15. See *Executor and Administrator*, 210, and *Scire Facias*, 4; as to when sale under execution without revival, and the duty of revival.

16. See *Judgment*, 39, and *Scire Facias*, 9; as to duty to revive

judgment; and sale under without revival, how far void.

17. See *Sheriff*, 13, 14; as to power of court to set aside sale under execution, and how far sale vitiated by quashal of execution, or its being satisfied before sale.

18. Executions are presumed in law to be continued on the roll; where one has issued therefore in the proper time no *scire facias* is necessary to revive. *McCoy v. Nichols*, 4 How. 31.

19. Where a decree was rendered in favor of F. against B., C., D. and E., the heirs of A., for the payment of money to be levied by execution, out of the property of A., and an execution issued commanding the sheriff to make the money out of the goods and chattels, lands, &c., of B., C., D. and E., or of the goods and chattels, lands and tenements of which A. died seized, and lands of A. were sold and bought by F.; held, that the variance between the decree and the execution was a mere clerical mistake, and did not vitiate the sale under it. *Starke v. Gildart*, 4 How. 267.

20. A judgment having been rendered in favor of a bank suing for the use of A., against B., the sheriff received the notes of the bank in payment of the execution by mistake, supposing the judgment belonged to the bank, and gave the defendant a receipt accordingly; detecting his mistake, he made a special return of the facts; held that the payment was not a satisfaction of the execution, and that the right of the usee to specie would be upheld. *Catlett v. Alexander*, 4 How. 404.

21. On a judgment against two, the execution must be against two; where therefore a surety on a forth-

coming bond supposes he is discharged by indulgence granted the principal, his remedy is not by motion to quash an execution against him on the bond. *Newell v. Hamer*, 4 How. 684.

22. See *Evidence*, 102 ; in case of lost execution.

23. Where an execution has issued within a year and a day after judgment, and is not satisfied, the plaintiff therein may take out his execution at any time afterwards without *scire facias* and without formal continuance entered from term to term ; such continuances are never entered now, the law presumes them to be entered ; where therefore a judgment was rendered and execution issued on it on the 27th of September, 1834, and no other execution issued until the 29th of June, 1839, the last execution was held to be regular. *Bank of Mississippi v. Catlett*, 5 How. 175.

24. After the return term of an execution, the sheriff has no right to receive money from the defendant on it, and such receipt will not bind the plaintiff ; and the court can, without the intervention of a jury, set aside the return of a sheriff made on execution ; and will, on motion, inquire into and correct the conduct of its officers according to the right of the case. *Planter's Bank v. Scott*, 5 How. 246 ; *Anderson v. Carlisle*, 7 How. 408 ; *Wood v. Robinson*, 3 S. & M. 271. Nor will the fact that the sheriff is special agent of the plaintiff in the execution make any difference. *McFarland v. Wilson*, 2 S. & M. 269. And a sale of real estate under execution after its return day is void. *Lehr v. Rogers*, 3 S. & M. 468.

25. An agreement between the

sheriff and defendant in an execution, for the payment of that execution in bank money or any thing else than the legal currency, will not satisfy the judgment, *Ib.* ; and if an execution be paid in uncurrent bank notes, when the sheriff and defendant both knew that specie would be demanded, and the sheriff return the execution satisfied, his return will be set aside as false. 7 How. 408 ; *Morton v. Walker*, 7 How. 554 ; *Gasquet v. Warren*, 2 S. & M. 514 ; *Wood v. Robinson*, 3 S. & M. 271 ; *Anketell v. Torrey*, 7 S. & M. 467.

26. Where the sheriff returns upon an execution that he advertised the sale according to law, it will be presumed that the requisites of the law were complied with. *Drake v. Collins*, 5 How. 253.

27. The return of the sheriff on an execution of "no property found," is not *prima facie* evidence that the execution was returned on the return day ; the return of the execution is a matter *in pais* to be shown by *parol*. *Izod v. Addison*, 5 How. 432.

28. Where a plaintiff and defendant in execution agreed in consideration of a release of errors by the defendant, that the plaintiff would stay his execution for a year unless the defendant consented for its earlier issuance, and the execution did issue immediately without any stay at all, and money was made on it and other executions on junior judgments, held that the lien of the elder judgment was not lost by the agreement, as the acquiescence of the defendant would be presumed, and that being the eldest judgment it would be entitled to the money. *Jones v. Bailey*, 5 How. 564.

29. See *Variance*, 6 ; omission

of the word bank, in an execution on a judgment in favor of the President, Directors and Company of the Planter's Bank, is immaterial.

30. A sheriff's return on execution that he had received so much money "in bills of the Mississippi Union Bank" is not a satisfaction of the judgment. *Tutt v. Fulgham*, 5 How. 621; *Anderson v. Carlisle*, 7 How. 408; *Morton v. Walker*, 7 How. 554.

31. After a levy of execution and benefit of the valuation law claimed, and a return of no sale because the property did not bring two-thirds of the valuation, an alias execution cannot issue until the expiration of the twelve months, at which time, by law, the valuation expires; two operative executions cannot be predicated on the same judgment at the same time. *McGehe v. Handley*, 5 How. 625.

32. A levy on sufficient personalty is a satisfaction of the execution to the extent of the levy; and a levy on sufficient real estate is so far an execution of the judgment as to postpone the right to a second writ. *Ib.* It is only *prima facie* satisfaction, which may be rebutted. *Kershaw v. The Merchants Bank of New York*, 7 How. 386; *Bibb v. Jones*, 7 How. 397; *Pickens v. Marlow*, 2 S. & M. 428. *Walker v. McDowell*, 4 S. & M. 118.

33. Where money is made on an execution on a junior judgment, an execution on a senior judgment not levied, will not be entitled to the money. The oldest execution levied will take it. *Robinson v. Green*, 6 How. 223.

34. Where the endorser of a note on which judgment has been obtained, applies under the statute subjecting the property of the maker first to execution, to protect his

own property from execution by showing that of the principal, he must identify the property he points out in such a way as to enable the sheriff to make a levy on it; in case of land, the precise sections and parts of sections must be designated; the township and range alone will not be sufficient. *Gibson v. Hughes*, 6 How. 315.

35. An execution on the original judgment, after forthcoming bond given by some of the parties to the original judgment, is a nullity. *King v. Terry*, 6 How. 513. *Field v. Morse*, 1 S. & M. 347.

36. A sale under junior judgment will not pass the title divested from the lien of the senior judgment; but in such case the junior judgment will be entitled to the money made on the sale. *Commercial Bank of Manchester v. Coroner of Yazoo County*, 6 How. 530; *Commercial and Railroad Bank v. Helderburn*, 6 How. 536; *Goode v. Mayson*, 6 How. 543; the rule will be the same whether the elder judgment be in the circuit court of the United States, or in the state courts. *Andrews v. Wilkes*, 6 How. 554; *Bibb v. Jones*, 7 How. 397.

37. A stay of execution which expired before the recovery of a judgment against the same defendant subsequent to that on which the stayed execution issued, does not affect the lien of the elder judgment as against such junior judgment. *Foute v. Campbell*, 7 How. 377.

38. It seems that as a general rule the mere failure to sue out an execution without any *act* of the plaintiff authorizing the delay, will not impair the lien of the judgment so as to let in junior incumbrances; yet if the delay to sue

out execution show an evident design to protect the defendant's property against other creditors, or if the delay is continued until other creditors have enforced their executions by levy and sale, it would amount to fraud, if the delay were such as to justify that inference. A failure to sue out execution for two years, after repeated previous executions, and the payment of a large sum, is not evidence of fraudulent delay. *Ib.*

39. Where there is a subsisting levy undisposed of, and an execution afterward issue and be levied on property, and a sale take place to an innocent purchaser, his title it seems will be upheld; such subsequent levy is not void; the execution might be quashed, but if the defendant omit to quash it, the sale will pass a good title. *Bibb v. Jones*, 7 How. 397.

40. Whether, where a sheriff levies on personal property and sells it for depreciated money, the levy is a satisfaction of the judgment, *quære*? Where such sale after levy is made *by the defendant* with the consent of the sheriff, it is a release of the levy, and clearly no satisfaction of the judgment. *Morton v. Walker*, 7 How. 554.

41. The plaintiff in execution is entitled to the money made on execution, as against his attorney who obtained the judgment, and all others who do not show a legal right to it. *Dunn v. Newman*, 7 How. 582. But a payment to an attorney will discharge the sheriff, unless *positively prohibited* by the client from paying it to the attorney. *Buller v. Jones*, 7 How. 587.

42. An execution cannot be perpetually superseded or suspended for an error which preceded the

judgment on which it was rendered, and when the judgment cannot be set aside upon motion merely; as where a judgment is rendered on a forthcoming bond, and the defect complained of was in the making of the bond. *Jones v. Stanton*, 7 How. 601.

43. Property purchased on condition, where the condition has not been complied with, cannot be levied on under execution. *Mount v. Harris*, 1 S. & M. 185.

44. A sheriff's return of satisfaction on an execution cannot be set aside as false, upon the motion of the plaintiff, without notice to either the defendant in the execution or sheriff. *Mann v. Nichols*, 1 S. & M. 257.

45. See *Forthcoming Bond*, 32. An execution must follow the judgment as to parties, or it will not be sustained.

46. See *Sheriff*, 34; for his liability for failure to return execution.

47. See *Attorney at Law*, 27; nothing but payment of money satisfaction of execution; attorney's own debt is not.

48. See *Judgment*, 94; valuation law does not lose or postpone lien of judgment, where a postponement of sale takes place, in consequence of property not bringing two-thirds of its appraised value.

49. See *Judgment*, 95; junior judgment first levied will take priority of senior in county where neither rendered, if no abstract of either be filed.

50. See *Judgment*, 102, 103; execution on affirmed judgment, must be issued by the circuit clerk against the parties who prosecute the writ of error and their sureties; and execution on the original judgment may be issued against those

who did not join in the writ of error.

51. At a sale under an execution against several defendants, one of the defendants has as much right to and may as lawfully purchase as any other person. *Robinson v. Parker*, 3 S. & M. 114.

52. Where two executions issue for the same debt against different defendants, a levy and sale under one extinguishes the other; and a motion to have satisfaction entered of it is the appropriate remedy, and an illegal appropriation by the sheriff of the money arising under such sale, to junior executions, will not deprive the defendant in the other execution, of his right to have it satisfied; the plaintiff should see to the proper appropriation of the money; yet it must appear affirmatively that the property sold for enough to extinguish the execution against one before the other will be ordered to be extinguished. *Planters Bank v. Spencer*, 3 S. & M. 305.

53. See *Crop*, 1, 2; growing crop not saleable under execution.

54. Executions being by statute returnable to the next term after their issuance, if fifteen days intervene between the date of the issuance and the first day of the term, if one issue more than fifteen days before the April term of the court, and be made returnable to October term, it will be void, and a sale under it in July, will also be void. *Lehr v. Rogers*, 3 S. & M. 468.

54. Upon a judgment against an executor and a return of *nulla bona*, a *scire facias* cannot be sustained by the creditor against the heir to subject the real estate of the decedent. *Foster v. Sumner*, 3 S. & M. 606.

55. The plaintiff in execution is not bound to pursue his remedy on a claimant's bond given for the trial of right of property levied on under his execution, in which he has obtained a verdict; that bond is but cumulative security, and he may resort to his original judgment. *Walker v. McDowell*, 4 S. & M. 118.

56. Where a levy is made on personal property, and the judgment on which the execution issued was afterwards taken to the high court of errors and appeals and the execution "*superseded*;" and a judgment rendered in that court, affirming the judgment below, and giving judgment against principal and surety in the writ of error bond; *held*, that in view of the practice prevailing in this state of restoring property to the defendant in the execution where a *supersedeas* is obtained, the facts constituted a removal of the levy; but it is questionable whether a mere *supersedeas* of an execution is an amotion of a levy already made under it; yet if the sheriff voluntarily restore property levied on, to the defendant, it might impose liability on the sheriff, but would not restore the lien of the judgment. *Ib.*

57. The act of May, 1837, that requires an affidavit of the insolvency of the maker, before the property of the indorser or surety could be reached, does not require a similar affidavit of the insolvency of the first indorser, before that of the second indorser can be proceeded against; and that part of the statute which provides that when the plaintiff has made affidavit of the maker's insolvency, he may proceed against the parties next liable and so on, is directory merely

to the sheriff, and when a levy is made on the property of the second indorser, there being no return as to the first, the court above will presume the sheriff did his duty in making such levy when the question whether he did or not was not put in issue in the court below; and in a motion against the sheriff to pay over money made on executions, according to their priority, and the oldest was against the defendant as second indorser, and the others against him as principal, it will be no defence to the sheriff, that the first indorser had property and the sheriff had failed to take the legal steps to make the money out of him though he was a defendant also in the oldest judgment. *Hamblin v. Foster*, 4 S. & M. 139.

58. See *Evidence*, 148; what variance between an execution and the description of it in pleadings, is immaterial.

59. See *Surety*, 21; surety may compel sheriff, by petition to circuit court, to levy on property of the principal; and need not make affidavit of suretyship where that fact appears of record.

60. The interest of the vendee in land, who has taken a bond for title on payment of the purchase-money and has paid the purchase-money, is subject to seizure and sale under an execution at law against him. *Thompson v. Wheatley*, 5 S. & M. 499; *Moody v. Farr*, 6 S. & M. 100; but where the purchase money is not paid, it is not subject to sale under execution; and the purchaser will acquire no right to the property, even though sold under a judgment for the purchase-money; whether the purchaser is entitled to be substituted to the rights of the vendor to the extent

of his bid at the sale under the execution. *Quære? Goodwin v. Anderson*, 5 S. & M. 730. If the purchaser at such sale, file a bill against the vendor, alleging the payment by the vendee before the sale under execution; and demanding a title; and the vendor deny the payment and aver a delivery up of the title bond, and a cancelment of the sale before the sale under the execution, the purchaser at the sheriff's sale must prove that the whole purchase-money was paid, or his bill will be dismissed. *Moody v. Farr*, 6 S. & M. 100.

61. The return on an execution in these words, "levied this and other *fi. fas.* on lots four and five, in square one, south of main street, Columbus, advertised and sold the same, &c." is sufficiently descriptive of the premises sold. *Hand v. Grant*, 5 S. & M. 508.

62. See *Vendor and Vendee*, 25, 31; the interest of a vendor who has given bond for title to land, how far saleable under execution.

63. The consent of plaintiff to receive bank notes in satisfaction of an execution, may be express or implied, and all facts and circumstances tending to show such consent are proper to go to the jury; where, therefore, A. made a motion against a sheriff and his sureties to pay over money collected on an execution, and the sheriff was permitted to prove that he collected the notes of the Mississippi Union Bank, and notified A.'s attorney of it, who expressed no dissatisfaction thereat: that A. was in the habit of receiving from his agents and attorneys at law the same kind of funds; that such notes constituted the circulating medium of the country at that time

and were uniformly received by clients; that the money was received in December, 1839, and the motion was not made until November, 1843; *held*, that evidence was proper to go before the jury, as tending to show the consent of the plaintiff to receive the bank notes in satisfaction of the execution, and verdict of the jury to that effect, would not be disturbed. *Ankatell v. Torrey*, 7 S. & M. 467.

65. See *Judgment*, 139; interest of grantor in a deed of trust and of *cestui que trust* not subject to seizure and sale under execution at law.

66. See *Judgment*, 140; when levy, satisfaction of.

67. See *Banks*; when payment in bank notes satisfaction of; See *Vendor and Vendee*; interest of vendee who has bond for title not saleable under execution, yet if sold by vendor under execution for the purchase-money, the title will pass to the purchaser.

68. Where an execution is returned satisfied, a purchaser from the defendant therein will hold the property free from the lien thereof, even though the return of satisfaction be afterwards set aside as fraudulent; the right of a *bona fide* purchaser could not be affected thereby. *Sevier v. Ross*, Freem. Ch. 519; *Parks v. Person*, 1 S. & M. Ch. 76: *aliter*, if the false return is made *after* the sale of defendant's property. *Ib.*

69. An equity of redemption in personal property is not subject to seizure and sale under an execution at law, on a judgment on the mortgage debt. *Valentine v. Planters Bank*, Freem. Ch. 727.

70. It is wholly irregular to set aside a return of satisfaction upon an execution in a court of law

without notice *at least* to the defendant in the execution; such a proceeding is absolutely void. Whether, where the vacating the return upon the execution will affect the rights of subsequent purchasers from the defendant in the execution, they are entitled to notice of the proceedings, *quære?* *Parks v. Person*, 1 S. & M. Ch. 76.

EXECUTOR AND ADMINISTRATOR.

- a. *Executor and Administrator generally; and herein of allowance to them; presentation of claims to save the bar of the statute; and other matters not embraced in the succeeding titles.*
- b. *Accounts of Executors and Administrators.*
- c. *Who may administer; and herein of the right to administration and removal therefrom.*
- d. *Administrator de bonis non, and herein of his powers and duties.*
- e. *Bond of Executor and Administrator; when and how put in suit, and suit thereon.*
- f. *Commissioners of Insolvency; and referees of claims appointed by the probate court and the effect of their action thereon.*
- g. *Devastavit.*
- h. *Insolvent estates; and herein of the report of insolvency.*
- i. *Revival of suits and judgments against Executors and Administrators; and herein of sale of the decedent's property without revival.*
- j. *Sales by Executors and Administrators; their requisites and what passes thereby.*

a. *Executors and Administrators.*

1. If A. die intestate and administration be granted to B., who dies after partial administration, a new administrator *de bonis non* of A.'s estate must be appointed; the trust will not be continued to B.'s admin-

istrator. *Hendricks v. Snodgrass*, Walk. 86.

2. Upon an obligation of A. B., promising to pay to C. D., curator of the estate of E. D., deceased, or to the legal representatives of said estate, the sum of \$950, an action cannot be maintained in the names of certain persons describing themselves as the legal representatives of the estate of E. D., deceased, without stating how or in what manner they became such. *Cushing v. Gibson*, Walk. 87.

3. Such an instrument being a chose in action belongs to the executor or administrator and not to the heir. *Ib.*

4. The term legal representative is a generic term embracing several species as heirs, executors, administrators, de bonis non, or with will annexed, and the exact character in which the plaintiff sues, should be stated in the declaration or it might not be a bar to a second suit. *Ib.*

5. An administrator of a deceased person, dying here without heirs, cannot by injunction restrain the escheator general from collecting the property of the deceased; a creditor of such deceased person must proceed against the escheator general, who is entitled to the possession to the exclusion of the administrator. *Bolls v. Duncan*, Walk. 161.

6. See *Interest*, 2; as to interest on legacies charged on personal property. *Brownlee v. Steel*, Walk. 179.

7. A. having taken out letters of administration on the estate of B., in one state, cannot be sued as administrator in this state on a judgment against him as such administrator in the other state where he administered. *Winter v. Winter*, Walk. 211.

8. An administrator is not entitled to the possession of his intestate's real estate and cannot maintain an action for forcible entry and detainer on account of it. *Car-michael v. Davis*, Walk. 221; Ev. 14.

9. Under the statute of this state, Rev. Code, 118, § 60, a defendant executor may prove offset or any special matter under general issue. *Herrington v. Herrington*, Walk. 305.

10. Where A. dies, bequeathing slave to B., who was in possession of slave at A.'s death and so continued, A.'s executor may recover of B. hire for the slave up to the period of one year after the grant of letters to him. *King v. Cooper*, Walk. 359.

11. If the defendant crave oyer of the letters of administration they must be produced; the order for the appointment will not do. *Caradine v. Belfour*, Walk. 532.

12. Executor in Kentucky may authorize legatee in this state to sue. *Hamilton v. Cooper*, Walk. 542.

13. On a judgment against an executor as such, the sheriff should not levy the execution on the individual property of the executor; that is no more liable to the judgment than a stranger's. *Jones v. Miles*, 1 How. 50.

14. See *Injunction*, 1; as to whether compelled to give bond on obtaining injunction.

15. The debt of an administrator to his intestate is not money in the hands of the administrator, under the statute; unless he insert it in the list of debts reported to the court; and if he fail, upon complaint of some one interested, the probate court may, by consent, decide upon the question of indebtedness or may award an issue to the

circuit court, when he will be held liable for his debt as money. *Kelsey v. Smith*, 1 How. 68.

16. By the common law an administrator could not be charged in the course of administration with a debt claimed against him, unless he had inventoried it or acknowledged its justness. Would his disbursements to the full amount of assets and the claim against him be such acknowledgment? *Ib.*

17. Where a debt has been contracted with an administrator, on account of the intestate's estate, debts due by the intestate, purchased after the debt with the administrator was contracted, will not be offsets; and if the estate be insolvent the debts of the intestate will not be offsets to debts due the administrator as such, though owned at the time the latter debts were contracted; where estates are insolvent the law directs an equal distribution, which would be defeated by allowing such offsets. *Whitehead v. Cadz*, 1 How. 95.

18. See *Pleuding*, 24, 25, and 26; as to the plea of the statute of limitations, by executor. *Wren v. Span*, 1 How. 115.

19. It is not necessary that a claim against a deceased person should be probated, in order to make a valid presentation of it to the executor, to save the bar of the statute; the statute, requiring the probate or allowance of claims, is intended for the benefit of those entitled to the estate and the executor, and does not affect the rights of the holder of such claim; a plea, therefore, to an action on a claim not probated, that it had not been probated, would be bad. *Ib.* And to the same effect, is *Judge of Probate v. Hairston*, 4 How. 242.

20. In an action, by an administrator *de bonis non*, against the surety of the first administrator, on his bond to recover a balance due on the administration account of the first administrator, it is competent for the surety to show that a sum charged by the administrator as paid to him by the debtor of his intestate, was not in fact paid, but that the administrator, who was insolvent, and owed such debt of his intestate, had received his own paper, by collusion with such debtor, in payment of the debt, and that, therefore, the debt to the intestate was still legally unpaid, and the surety of the administrator not liable therefor; and to that end such debtor of the intestate could be compelled to testify, even though it might subject him to a civil suit. *Judge of Probate v. Green*, 1 How. 146.

21. The personal property of a deceased debtor, in the hands of a distributee, after distribution made, is liable to the satisfaction of a judgment obtained against the administrator; nor is that liability affected by the fact that the administrator gave a bond for his administration of the estate, on which the creditor had his remedy. *Brooks v. Lewis*, 1 How. 207.

22. Suits against administrators shall not abate by reason of the insolvency of the intestate, but shall be prosecuted to final judgment. *Breckenridge v. Mellon*, 1 How. 273.

23. Where a distributee of an estate purchases property at the administrator's sale, it is competent for the probate court to deduct from her distributive share the amount of her purchase; and the allowance of the administrator's account, charging her with such pur-

chase, will be regarded as such decree of the court; such allowance cannot be made to the prejudice of other distributees. *Mahon v. Bower*, 1 How. 275.

24. Where an administrator has passed off a note of his intestate to a distributee, in payment of her distributive share, he cannot credit his account with such note, unless he had previously charged himself with it. *Ib.*

25. A. having administered upon an estate, and having also been appointed guardian of three of the minor heirs, and executed separate bonds for each, cannot be charged and held liable in the same bill, at the suit of the heirs jointly, because their interests are each distinct, and separate, and independent; nor could he be charged in the same suit, as both administrator of the ancestor, and guardian of the heirs, for neglect in the several characters; those liabilities being separate and distinct, and in no ways connected; nor could a bill be filed to make an administrator liable as such, and also for a personal debt due by him. *Wren v. Gayden*, 1 How. 365; *Carmichael v. Browder*, 3 How. 252.

26. In all cases of trust, where the trust is direct and express in its character, or is direct and technical, and cognizable only in a court of equity, or where the right may be litigated between the trustee and *cestui que trust*, the statute of limitations will not apply; therefore, inasmuch as equity assumes the right of enforcing the duties of executors and administrators; and they come into the possession of the property of the deceased as trustees, they will not be permitted, where the estate is still unsettled, to set up the statute of limitations

against the distributees of the estate, calling them to account, and seeking to recover specifically the property of the deceased; even though such executors or administrators have asserted title in themselves to such property, by virtue of an alleged allotment of it as their distributive shares. *Ib.*

27. Nor will executors and administrators be allowed in equity to plead the statute of limitations against the claims of distributees, although there is a remedy in favor of such distributees at law, upon the bond of the executor and administrator. *Ib.*

28. Where executors were given discretion to lay out a town, and a party, claiming to be administrator with the will annexed, proceeds, though illegally appointed, to lay out the town, dedicate commons and streets, and sell lots; his acts will not be held valid, because they were such as the executors would have been bound to perform, under the will. *Vick v. The City of Vicksburg*, 1 How. 379.

29. An executor is authorized to retain money in his hands, to pay a debt due himself, but if he fail to do so, he cannot charge the estate with the amount of the debt, and have it allowed by the orphan's court, on notice, and confirmed by auditors, on exception, so as to make it conclusive on heirs; the jurisdiction of the probate must not only be over the person, but also over the *thing*; and its decrees are not conclusive otherwise; and the probate court has no power after an executor has ceased to be such, to decree a debt in his favor, as due by the testator; and if the executor seek to have such decree made, he must make it appear affirmatively, from the record, that

he was executor at the time it was made. *Gildart v. Starke*, 1 How. 450.

30. The rule of marshalling assets, by which the personal property was first subject to debts, then the land descended, and then the land devised, is entirely consistent with our statute law. *Fisk v. McNiel*, 1 How. 535.

31. Where the statute of distributions says that the personal estate shall "descend in the same way and manner" as real estate, it means to designate the course of descent, rather than the kind of title conferred. *Ib.*

32. See *Ib.*; and *Chancery*, 131, for jurisdiction of equity, at suit of distributees, against administrator and others, to recover ancestor's estate, and for account.

33. An executor, or administrator, has no right to the possession of the land of his testator, or intestate, except to finish growing crop; it descends to the heir, who is alone entitled to possession; if, however, the executor, or administrator, take possession, and use it, the profits will be assets, as the assent of the heir will be presumed. *Smith v. Winston*, 2 How. 601.

34. See *Surety*, 7, for the right of a surety, on the bond of an administrator, who pays a debt of the administrator, which the administrator contracted for a debt of the intestate, to subject the property of the intestate to his reimbursal. The administrator having that right the surety has it likewise.

35. If an administrator has failed to return an inventory, or have received, and not accounted for assets, he is liable on his bond; and a court of equity has no jurisdiction to review his administration. *Edmundson v. Roberts*, 2 How. 822.

For jurisdiction of equity over administration, see *Probate Court*, 8.

36. See *Bills of Exchange and Promissory Notes*, 33, for action on note payable to J. S. as administrator.

37. A promise, in writing, by S., as executor, to pay a certain sum for lumber, furnished for the completion of a building which S. as executor, was finishing, is binding on S. individually; as are all contracts of executors, though signed "as executor," unless it clearly appear that it was given for a debt of the testator; and if for his debt, but made payable at a future day, with interest, he is also liable. *Sims v. Stilwell*, 3 How. 176.

38. It is a sufficient presentation of a claim, paid by the surety of an intestate, against such intestate's estate, to save the bar of the statute, that a notice, describing the nature of the claim, was served on the administrator, informing him that a motion would be made against him on the claim; even though the holder of the claim could not legally sustain such motion; it is not necessary, in order to make a valid presentation, that the account should be probated, or have the voucher of the oath of the party; the judgment of a court of record is a voucher of a higher nature, and ample justification for the administrator to pay; but if he pay without such voucher, or that fixed by statute, he does it at his own peril. *Smith v. Smith*, 3 How. 216; *Campbell v. Young*, 3 How. 301.

39. If the profits of land in the hands of an administrator be *assets*, he may be compelled to account for them by the probate court; if they belong to the heir the remedy

is at law. *Carmichael v. Browder*, 3 How. 252.

40. An execution against an administrator is no evidence against the heir, who is not privy to a decree against the administrator, and not bound by it. *McCoy v. Nichols*, 4 How. 31.

41. The administrator takes the personalty; the heir the land; a judgment against the administrator, therefore, does not bind the realty, and is no evidence against the heir. *Ib.*

42. A. obtained a decree against the administrators of B., under which the land of B. was sold; *held*, that no title passed to the purchaser; and that the judgment against the administrators of B. was no evidence to charge the heirs of B., and could not be revived against them; that if there was any right against the heirs, it must be pursued on the original contract of the ancestor. *Ib.*

43. Although the probate court has the right to decree a sale of realty, where the personalty is insufficient to pay the debts; yet it will not decree such sale where the heir has sold the realty, and the debt for which it is sought to sell it has been barred by lapse of time. *Ib.*

44. An administrator may indorse and assign notes, the property of his intestate, for legal purposes, in settlement of the estate; but if he indorse, or transfer, a note of his intestate, on his own private account, in purchase of property for himself, to one having knowledge of the fact, no title will pass to the transferee, and when a suit is brought on the note against the maker, in the name of the administrator, for the use of such transferee, it will be a good defence to

set up such transfer in bar of the action. *Prosser v. Leatherman*, 4 How. 237.

45. Where a note on its face is payable to A., as administrator of B., it is notice that A. holds it in his representative capacity. *Ib.*

46. Where a suit is brought against an administrator, on his bond, for not paying a debt of the intestate, when he had assets, it is not a good plea that the right of action did not accrue within six years before the commencement of the suit; he should plead his exemption from liability to pay, as administrator, when the claim was presented to him as such. *Judge of Probate v. Hairston*, 4 How. 242.

47. Where an executor, within the time limited for the presentation of claims, is heard to speak of a claim against the estate, it would afford a strong presumption that the claim had been presented properly; but no such presumption arises where the claim is spoken of, after the expiration of the limited time. *Pickett v. Ford*, 4 How. 246.

48. A claim growing out of a warranty, broken before the death of the testator, is subject to the operation of the statute requiring claims to be presented within eighteen months; it seems otherwise, if the warranty be broken after his death. *Ib.*

49. Where a bill is filed in the probate court at a subsequent term, impeaching the final settlement of an executor, for fraud in it, and for that reason praying that it may be set aside, and the executor demurred to the petition, the fraud in the final settlement will be thereby admitted; that fraud will vitiate it, and the executor will still be subject to the jurisdiction of the

court, and his account should be set aside. *Hurd v. Smith*, 5 How. 562. But whether the probate court, at a subsequent term, can entertain jurisdiction of an original bill or petition to vacate its own decrees for fraud; *quære?* *Smith v. Hurd*, 7 How. 188.

50. See *Detinue*, 10. When administrator is sued in detinue, it is no defence that he surrendered up the slave sued for, to an officer who had an execution against his intestate.

51. If a judgment in a suit, against an administrator, as such, for a debt due by his intestate, be rendered against the administrator individually, it will be a mere clerical error, which may be amended at any time by the court, and even without amendment the judgment would be evidence against the administrator, in an action on his bond, for a *devastavit*. *Hoggatt v. Montgomery*, 6 How. 93.

52. A security on an administrator's bond, who has also purchased property at the administrator's sale of his intestate's effects, cannot, when sued for the purchase-money, enjoin the suit, on the ground that the administrator was insolvent, and the surety was likely to be held liable for him on his administration bond; no misapplication of assets being charged. *Marsh v. Bennett*, 6 How. 215.

53. Executor and administrator, though by statute they need not plead anything but the general issue, yet they may plead specially if they choose; if an executor, sued as such, plead non-assumpsit by himself personally, it will not authorize a verdict against him in his own right. *Bozman v. Brown*, 6 How. 349.

54. The executor or administra-

tor is a necessary party in every case where distribution of the intestate's property is sought; and a decree for distribution, without making him a party, is erroneous. *Porter v. Porter*, 7 How. 106.

55. On a petition for the distribution of A.'s estate, a *pro confesso* taken against B. as administrator of C., who in his lifetime had administered on A.'s estate, will not affect the heirs of A. *Ib.*

56. Where an executor is carrying on the plantation of his testator, under the statute which authorizes it to be done, so far as the growing crop is concerned, under the authority of the probate court, the debts contracted by him for necessities, in completing the crop, are privileged claims on the income of the place, but not on the other property; and a subsequent administrator *de bonis non*, is bound to pay such debts out of such crop, or if that has been used as assets of the estate, out of any other property of the estate; and medicines furnished for the slaves, would constitute necessities. *Emanuel v. Norcum*, 7 How. 150.

57. An executor derives his authority from the will, and is authorized to take charge of the estate before he qualifies; and expenses which he incurs in taking care of the estate, are a charge upon it. *Ib.*

58. See *Bills of Exchange and Promissory Notes*. Administrator when sued on note of his intestate, by pleading general issue, admits the execution of the note; if he wish to deny it, he must do so on oath.

59. An executor or administrator is entitled to the commissions allowed by law, not merely upon that portion of the estate which has

been appraised, but upon the whole estate administered; the statute allowing commissions on the amount of the "appraised value" of the estate, intended to embrace the whole estate administered; but the allowance to the executor or administrator, of his commissions, can only be made upon final settlement, and are to be a credit to him as of that date. *Merrill v. Moore*, 7 How. 271; *Shurtliff v. Wither- spoon*, 1 S. & M. 613.

60. The probate court may compel an executor or administrator, on petition of those interested, to return an inventory of property of the deceased, not embraced in a previous inventory. *Killcrease v. Killcrease*, 7 How. 311.

61. If the executor give insufficient security, it is the duty of the probate court, on the application of those interested, to require additional security. *Ib.*

62. See *Forthcoming Bond*, 31. Whether executors can give such bond, and how execution must issue?

63. The purchase of property by an administrator, at his own sale, is voidable, but whether absolutely void or not, *quære*? *Baines v. McGee*, 1 S. & M. 208.

64. If such purchase be not void, the statutory lien for the purchase-money would still exist, and could be enforced against the property in the hands of the vendee of such administrator; and a payment by such vendee to the administrator, would not necessarily discharge the lien; payment to the estate is necessary. *Ib.*

65. An administrator has no right to sell property for any other purpose than to pay debts, or to enable him to make distribution. *Ib.*

66. An administrator sells property of his intestate at private sale, and takes notes for the purchase-money, payable to himself, and dies before collecting them. A bill filed by his administrator *de bonis non*, in the alternative, either to have the sale by the first administrator declared void, or if held valid, to enforce the statutory lien for the purchase-money, is not demurrable for duplicity. *Baines v. McGee*, 1 S. & M. 208; *Murphy v. Clark*, *Ib.* 221.

67. A sale of the personal estate by the widow, or the removal by her of the slaves of the intestate, cannot affect the rights either of the administrator or of the creditors. *Caruthers v. Wilson*, 1 S. & M. 527.

68. Under the statutes, executors and administrators who give bond for the administration of the estate, are not bound to give appeal bonds; they may appeal without one. *Scott v. Searles*, 1 S. & M. 590. *Aliter*, if the decree or judgment is to make him personally responsible. *Wade v. The American Colonization Society*, 4 S. & M. 670.

69. The distributees of a deceased person's estate are, under the probate law of this state, entitled to distribution of the estate, according to law, after the expiration of twelve months from the grant of letters of administration; nor is it any bar to such distribution, that there are outstanding debts or liens on the estate; but it is a condition precedent to such distribution, that the distributees execute a refunding bond with security, conditioned according to the statute. *Murdock v. Washburn*, 1 S. & M. 546; *Ib.* *Berry v. Parkes*, 3 S. & M. 625.

70. The distributee of an estate,

if entitled at all, is entitled to immediate distribution; on application for distribution, it is therefore error to permit the administrator "to retain possession of the property to gather an ungathered crop," before distribution is allowed. *Ib.*

71. G. having intermarried with the widow of C., and enjoyed the possession of C.'s estate during his wife's life and after her death, a period of about twenty years, and made no charge against the estate of C., during all that time, for the support or maintenance of C.'s children, who lived with him, or for money paid out on account of the estate; *held*, that the facts raised a fair presumption that G. never intended to make such charge, and that therefore an account made out by G.'s administrator, embracing such items, should be disallowed; the lapse of time alone being sufficient to bar his claim. *Carter v. Judge of Probate*, 2 S. & M. 42.

72. J. being in debt, and O. his surety, J. conveyed property to O. to secure him, and delivered it to O., with verbal authority to sell, in case he became liable; J. died, and O. having been rendered liable and paid J.'s debt, sold the property to indemnify himself; H., a creditor of J. sued O., as executor *de son tort* of J.: *Held*, that O. was not thereby made such executor; nor would he be such executor, even as to a surplus remaining in his hands, from the sale of J.'s property, after reimbursing himself, there being at the time of suit no representative of J. to receive the money; and it would be competent for O. to show that J. in his lifetime had ordered such surplus to be paid to other persons than the plaintiffs, and to that end to intro-

duce a deed from J. directing such payment. *O'Reilly v. Hendricks*, 2 S. & M. 388.

73. The publication of notice of the grant of letters testamentary, is not notice to all the world of the death of the testator; but notice only of the particular object of the statute in requiring it; nor is the grant of letters testamentary, though it is notice to all who are directly interested in its subject-matter, and have a right to object to the proceedings, and appeal from the judgment; if, however, such publication and grant were presumptive evidence of notice of the testator's death, it would be competent for the party to show, by positive proof, the want of notice thereof. *Helm v. Smith*, 2 S. & M. 403.

74. Positive proof need not be given of presentation, and notice to an executor of a claim against his intestate to take it out of the bar of the statute for non-presentation; any legal evidence which would satisfy a jury that the executor knew of the claim, would be sufficient; the notice by mail, therefore, of the dishonor of a note of the testator, received by the executor within the proper time, will be a sufficient presentation. *Ib.* The knowledge, by the executor, of the existence of the claim, is equivalent to presentation. *Miller v. The Trustees of Jefferson College*, 5 S. & M. 651.

75. The period allotted, under the statute, for the presentation of claims to save the bar, does not commence running until the whole time of publication, required by the statute, is completed. *Ib.* Nor does that statute commence running at all, until publication be made. *Dowell v. Webber*, 2 S. & M. 452.

76. See *Limitations*, 29. The period of nine months during which an administrator cannot be sued, is not to be computed when the bar of six years is plead.

77. A judgment against an administrator, must be against him as such, and not *de bonis propriis*. *Hill v. Robeson*, 2 S. & M. 541. And if it be *de bonis propriis*, it is a fatal defect; but in a suit against administrators, where the verdict was that the "deceased in his lifetime assumed, &c." and the judgment was "that the plaintiffs recover of the defendants administrators of said deceased, as aforesaid," the judgment was against them in their representative capacity, and not individually. *Neeley v. Planters Bank*, 4 S. & M. 113. Where the judgment is rendered *de bonis propriis*, the high court will reverse the judgment, but will render such judgment as the court below ought to have rendered. *Barrow v. Wade*, 49.

78. When property, real or personal, of a minor or a deceased person, is sold by order of the probate court, it is, under a statute of this state, subject to the payment of the purchase-money, in the hands of the purchaser or his assignee, in the same manner as if a mortgage had been taken on it; and this lien is notice to the administrator of the purchaser, of the claim, and is equivalent to presentation of the claim to him, as fully as a mortgage would be, and is not therefore barred by a failure to present it to such administrator, within eighteen months from publication of the grant of letters; liens of record being always in a state of presentation. *Miller v. Helm*, 2 S. & M. 687. So, also, the statute barring a claim not presented in

eighteen months, does not apply to official bonds, such as an administrator's bond; such bond is a matter of record and always in a state of presentation. *Gordon v. Gibbs*, 3 S. & M. 473. Nor to a mortgage. *Miller v. Trustees of Jefferson College*, 5 S. & M. 651; *Trustees of Jefferson College v. Dickson*, Free. Ch. 474.

79. An administrator may legally transfer negotiable paper of his intestate, and his indorsee, if he be innocent, and not chargeable with connivance, will hold it; but if he receive it, with knowledge that it is assets in the administrator's hands, in payment of the individual debt of the administrator, or for property sold to him for his own use, he cannot hold it; and if the note be payable on its face to such person, as administrator, it will of itself be notice that it is assets, and the administrator *de bonis non*, may file a bill in chancery against such assignee and the maker of the note, to recover the possession of the note, and also to enforce the statutory lien on the property for which the note was given. *Ib.*

80. See *Mortgage*, 16, 17. A note secured by mortgage is always in a state of presentation, and therefore is not barred for want of actual notice and presentation to administrator.

81. A general creditor of a decedent cannot call the administrator to account for his administration in the probate court, unless upon a legally authenticated claim; and when the estate is insolvent his remedy is at law. *Freeman v. Rhodes*, 3 S. & M. 329.

82. In general it seems that a promise by an executor or administrator to pay the debt of his testator or intestate, is not binding

without a consideration; such as assets at the time, forbearance to sue for a definite time; or a credit allowed in the administrator's account for the debt; so giving a note bearing interest will make him liable. *Turner v. Brown*, 3 S. & M. 425, and see *infra*, 172.

83. Where an estate is solvent the executor or administrator is subject to suit, at the instance of any creditor, in the courts of law, nor will the suit be enjoined, because in the probate court the estate was in the course of administration; nothing but the insolvency of the estate will stop a suit at law against it. *Sanders v. Douglass*, 3 S. & M. 454.

84. Whether a creditor's bill against an administrator to have the assets administered, will lie in this state. *Quære. Ib.*

85. An administrator who has sold property of his intestate upon credit under a decree of the probate court, will, in a proceeding against him, be presumed to have collected the amount of the sale until he makes the contrary appear; he will not be liable however, beyond the amount collected, provided the security he took for the purchase-money was good at the time and the loss has occurred by unavoidable casualty. *Gordon v. Gibbs*, 3 S. & M. 473.

86. See *Execution*, 54; *scire facis* against heir, cannot issue on judgment against executor.

87. Debts due the decedent are assets, but not to charge the executor or administrator, until he has received the money. *Berry v. Parkes*, 3 S. & M. 625.

88. An executor or administrator may release or compound a debt, and if in so doing he appear to have acted for the benefit of the

estate, he will not be chargeable with such debt as assets; nor will he be held responsible for loss without wilful misconduct or fraud; where, therefore, an administrator compromised a suit by giving time on the debt claimed, thereby rendering the debt safe, though previously doubtful, he cannot before the debt under the compromise has become due, be compelled by the distributees of the estate to pay, personally, the amount of the debt; and if the money be not collected, the administrator, individually, would not be liable. *Ib.*

89. See *Limitations, Statute of*, 30; whether that fixing the period for presentation of claims to administrator be more than a mere statute of limitations.

90. An administrator has no right or power to file a petition in the probate court to obtain directions from the court as to the mode of administering the estate; where therefore, M. died, indebted to a bank whose notes were greatly depreciated, and M.'s estate was declared insolvent; and commissioners of insolvency appointed thereon, and the bank had made a general assignment of its effects to assignees; and M.'s administrators, pending the commission of insolvency, filed a petition in the probate court, impleading the assignees, impeaching the assignment as fraudulent, and praying that the assignees might be compelled to receive their distributive share in the notes of the bank; held, that the probate court had no jurisdiction of the petition. *Robins v. Norcum*, 4 S. & M. 332; *Dalhgren v. Duncan*, 7 S. & M. 280.

91. See *Probate Court*, 28; the administrator of a deceased partner cannot, in the probate court,

call the surviving partner to account, or compel a discovery of partnership assets from him.

92. The lien which is given by statute, upon land, sold by an administrator, for the payment of the purchase-money, is not intended for his individual benefit, but for that of the estate; and it may well be doubted, whether any act of his, short of receiving actual payment, will discharge the lien; where therefore, C. as administrator, sold land of his intestate to T., on twelve months credit, who gave a note with sureties for the amount of the purchase-money, and when it was due, paid part and executed another note with other sureties for the balance, expressing on the face of the note that it was for a *bona fide* loan of money; *held*, that the land in the hands of a third party, to whom T. had sold it, and who had notice of the lien for the unpaid purchase-money, was liable to pay it; and that it was competent to show by parol, that the note last given was given for the balance due on the land; and if it were not competent to show that by parol, yet that the lien for the unpaid balance might still be enforced, the amount thereof appearing by other proof than the note. *Elliott v. Connell*, 5 S. & M. 91.

93. A court of chancery will enjoin an executor, after he has been discharged from his trust, and an administrator C. T. A. been appointed, from collecting the assets of the estate; but whether such executor may not properly retain any money of the estate which comes to his hands, to satisfy any balance due to him by the estate? *Quære*. *Stubblefield v. McRaven*, 5 S. & M. 130.

94. A power to sell land, if in

the opinion of the executor it should be deemed advisable, cannot be exercised by the administrator C. T. A. *Montgomery v. Milliken*, 5 S. & M. 151.

95. A court of probate cannot compel an administrator to appear before it in vacation, and give additional security upon his administration bond; and if it cite him to do so, the proceeding is *coram non judice* and void. *Wingate v. Wallis*, 5 S. & M. 249.

96. A judge of probate has no authority to issue process to command the sheriff to take property of an intestate out of the hands of an administrator, though it be alleged that the sureties on the administrator's bond are not good, and that he is about to remove the intestate's property out of the state. Such process is void. *Ib*.

97. At the September term, 1841, of the probate court of Wilkinson county, the children of C. filed their petition against the administrator of their father's estate, alleging that at the August term, 1841, the administrator had made a final settlement of his account as such, shewing a balance of \$2540 in his favor, which was received, allowed and ordered to be recorded; that the account was false and fraudulent; that \$3200 were allowed for the board and maintenance of the petitioners who were then, and some of them at the time of filing the petition, infants and without guardians; and that there were several omissions in the inventory of the administrator; the answer admitted the omissions but denied that they were by fraud or design; *held*, that the settlement made at the August term, 1841, so far as the account fell within the jurisdiction of the probate court was final and conclu-

sive ; but that so far as it allowed the administrator for the board and maintenance of the petitioners, it was erroneous and void. *Jones v. Coon*, 5 S. & M. 751.

98. Where the distributee of an estate is also indebted to that estate for property purchased at the sale of its effects, which indebtedness has been reduced to judgment, the probate court will order the distributive portion of such distributee to be credited on his indebtedness. *M'Gee v. Ford*, 5 S. & M. 769.

99. C. & H. filed a petition in the probate court against W. C., alleging that W. C. and themselves were jointly administrators *ad colligendum* on the estate of S. C. and that W. C. had in his possession property of the estate which he claimed as his own and refused to allow it to be inventoried, and prayed that he might be required to inventory it ; W. C. filed a petition to the jurisdiction of the probate court ; *held*, that the probate court should entertain jurisdiction of the petition ; and W. C. might have an issue to the circuit court for the investigation of his claim to the property in his possession ; *aliter* if W. C. had been a stranger to the administration. *Compton v. Camp-ton*, 6 S. & M. 194.

100. An executor or administrator is not bound to pay the debts of his decedent beyond the assets which he receives ; nor will his written promise to do so make him liable, unless founded on other sufficient consideration ; where, therefore, B. & J. B. being sued by H. upon their joint note offered to prove that the note was given in satisfaction of a decree of the probate court against B., as administrator of P., who in his life-time was administrator of N. P., in favor of H.,

as administrator *de bonis non* of N. P. ; *held*, that the evidence was admissible and that if the note were executed in settlement of that decree, B. & J. B. were not liable on it unless B. had assets sufficient for its payment. *Byrd v. Holloway*, 6 S. & M. 199.

101. The probate court has no power to appoint an administrator *ad colligendum* where there is one in chief. *Searles v. Scott*, 6 S. & M. 246.

102. On a note given to an administrator for the sale of property of his intestate he may institute suit in his own name, though it be payable to him as administrator ; and on his death the suit may be revived in the name of his personal representatives. *Laughman v. Thompson*, 6 S. & M. 259.

103. See *Consideration* ; it is competent to show a failure of the consideration of notes given an administrator for personal property of his intestate.

104. W. and others, distributees of the estate of M., filed a bill in the probate court against P. and others, as the sureties of S. M. on her administration bond of M.'s estate, S. M. having intermarried with one B. and removed with the property of the intestate out of the state ; the object of the bill was to compel B. and his wife to account for the property ; to have the amount due to the complainants decreed to them, and the bond declared forfeited and put in suit ; P. plead that by a former decree of the probate court, a proceeding against him as administrator of M. (which office he once filled conjointly with S. M. but had afterwards resigned) for the same matter and to the same effect with the present, had been dismissed by the court ; *held*, that

plea was insufficient ; P. having in the two proceedings been impleaded in different characters, in one as administrator and in the other as surety of the administratrix. *Washburn v. Phillips*, 6 S. & M. 425.

105. Where an administrator has left the state with the property of his intestate, can the distributees of the estate proceed by publication to make such absent administrator a party to a proceeding in the probate court by bill, for an account of his indebtedness to the estate and to have his bond put in suit against the sureties ? *Ib.*

106. Is not a bill in the probate court by the distributees of an estate against an administrator and his sureties on his official bond, to have an account of what is due by the administrator taken and to have his official bond declared forfeited and put in suit, liable to demurrer for multiplicity of parties ? *Ib.*

107. In plenary proceedings by bill in the probate court against an administrator, it is premature to enter a decree without taking the bill for confessed. *Ib.*

108. Where a judgment has been obtained against the administrators of a deceased person, and they, without paying the judgment, proceed to distribute the deceased's property among his legal distributees until it is all divided, the judgment creditor may levy his execution on any of the property thus distributed ; and that though the judgment be assigned and at the time of the levy belong to one of the distributees ; the equities among the several distributees as to the proportion in which they must pay the judgment cannot be settled in a court of law on a motion to quash the execution. *Vanhouten v. Reiley*, 6 S. & M. 440.

109. A judgment rendered against an administrator after he has resigned his letters of administration, and letters *de bonis non* have been granted to a third party, is binding neither upon the estate nor the administrator, and is a nullity. *Buckingham v. Owen*, 6 S. & M. 502.

110. The statute makes it the duty of executors and administrators to cause publication to be made for the presentation of claims against the estates which they represent, to be commenced within two months after granting letters testamentary. The same statute also provides that all claims against the estates of decedents shall be presented, &c. within eighteen months after the publication of notice ; *held*, that under this statute to bar a claim not presented within eighteen months from the publication of the grant of letters, the executor or administrator must show affirmatively that the publication was commenced within two months after the granting of letters testamentary. *Pearl v. Conley*, 7 S. & M. 356 ; creditors are not bound to take notice of publications to present their claims, &c. made after the lapse of that period from the date of appointment. *Ib.*

111. The transfer of a note due to an estate, by the administrator, in payment of his own debt, gives the assignee, with notice, no right of recovery ; and a subsequent administrator (the first having resigned his office) may enjoin the collection of the note in equity ; and the chancellor to prevent multiplicity of suits will direct the note to be delivered up to the administrator *de bonis non*. *Scott v. Searles*, 7 S. & M. 498.

112. A court of equity will en-

tain a bill for discovery and an account of assets, against an executor or administrator, upon a pure legal claim. *Martin v. Glasscock*, 1 S. & M. Ch. 17.

113. Where a person is sought to be charged in equity as *executor de son tort*, he should be sued as a regular executor. *Ib.*

114. Where an administrator sold his intestate's property and took from the purchaser, besides his bond for the purchase-money, a note of a third person as collateral, it was held that no negligence of the administrator to collect the collateral and the loss caused thereby could affect the administrator's right to subject the property sold to the payment of the purchase-money under the statutory mortgage thereon. *Steger v. Bush*, 1 S. & M. Ch. 172.

115. It is a valid defence to an action upon a promissory note against the maker, that the note belonged to a deceased person's estate, and that the plaintiff received it in payment of an individual debt of the administrator. Would the same rule apply if the note were payable on its face to the administrator? *Cotton v. Parker*, 1 S. & M. Ch. 191.

116. Where the testator directed certain lots of ground to be sold by his executor, if in the opinion of the executor it should be advisable, to accomplish the purposes of the will; *held*, that this was a discretionary power conferred upon the executor personally, and could not be exercised by the administrator, *cum testamento annexo*. *Montgomery v. Millikin*, 1 S. & M. Ch. 495.

117. An executor, as such, has no power to pledge the estate of his testator for a loan of money, nor to

create any lien upon it by deed or otherwise. *Ford v. Russell*, Freem. Ch. 42.

118. In the case of *Vertner v. McMurran*, Freem. Ch. 136, Chancellor Buckner decided that a court of equity had concurrent jurisdiction with the probate court, wherever it had, previous to the adoption of our present constitution, jurisdiction in matters testamentary; but the high court reversed the opinion. See *McMurran v. Vertner*.

119. An administrator has no power to purchase property for the estate with the funds of the estate; and if he trade off a note belonging to the estate to one knowing the fact, the transfer will pass no title, and the note or its proceeds can be recovered by the estate; as the property of a deceased person is a trust fund in the hands of the administrator for the benefit of the creditors and distributees of the estate. *Briscoe v. Thompson*, Freem. Ch. 155.

120. Where an administrator sold the property of the deceased, and the property was levied on in the hands of the purchaser under a judgment against him and the administrator, the purchase-money of the property not having been paid to him, being present at the execution sale, encourages a third person to bid for the property, telling him that the title is good; *held*, that the administrator would not be permitted afterwards to enforce against such third party buying the property, the administrator's lien for the unpaid purchase-money. *Ford v. McGehee*, Freem. Ch. 460.

121. Where an administrator purchased slaves belonging to the estate, the purchase will be such

administration or conversion of them as will prevent the administrator *de bonis non* from maintaining a suit for their recovery; the distributees of the intestate could alone sue for and recover the slaves, in the hands of any person having notice of their having belonged to the intestate, and having been illegally sold. *Miller v. Womack*, Freem. Ch. 486.

122. A suit properly framed may, it seems, be prosecuted against both the administrator and administrator *de bonis non* of a deceased person; but the bill must show a right to sue them; distributees, therefore, of the intestate who sue the administrator and administrators *de bonis non* of the administrator of their intestate, cannot maintain the suit, to recover property of their intestate; the suit should be brought by the administrator *de bonis non* of their intestate. *Ib.*

123. Where a bill is filed against administrators on the ground that they have not returned a true inventory of debts and property, it must state distinctly the errors and omissions, as none will be noticed but those pointed out. *Ib.*

124. An administrator who sells property of his intestate and takes insufficient security for the payment of the purchase-money is liable for the amount lost thereby, if he did so from *bad faith*, not otherwise. *Davis v. Yerby*, 1 S. & M. Ch. 508.

125. A bill against an administrator, charging him with waste and embezzlement of his intestate's estate, must make specific and definite charges of the particular waste and embezzlement; general charges are not sufficient; if it is sought to charge the executor with default or negli-

gence, the particular default must be put in issue and proved. *Ib.*

126. An administrator of an administrator cannot be called to account for the estate of the intestate of the first, without proof that the estate in fact came to his hands. *Ib.*

127. Where an interval of twelve years has elapsed since an executor has ceased to act in that capacity, and an attempt is made to bring him to an account, and he answers that he has fully administered, no decree for an account will be rendered against him. *Ib.*

128. P. being administratrix upon the estate of S. P., exchanged some notes of her intestate for two negroes, which were inventoried as the property of the estate of S. P.; P. intermarried with S. against whom judgment was afterwards obtained, and execution thereon levied on one of these negroes; *held*, that the negro was the property of the estate of S. P., and not liable to the judgment. *Shaw v. Thompson*, 1 S. & M. Ch. 628.

129. If an administrator buy property with the means of his intestate, the property so bought will be considered and treated in equity as part of the estate of the decedent; and if such property be inventoried by the administrator in the probate court, the record thereof will be notice of the fiduciary character of the property so purchased and inventoried. *Ib.*

130. An administrator may have a right, given to him by statute, of a trial at law of the right to his intestate's effects, when levied on by execution, without impairing his right to relief in equity. *Ib.*

b. *Accounts of Executors and Administrators.*

131. Where the law required an

administrator's account to be reviewed and allowed by the county and probate court, to make it final, it must appear by positive testimony that it was reviewed, before it will be final. *Cameron v. Gibson*, Walk. 500.

132. See *Guardian and Ward*, 3, 4; how far accounts and settlements of executor and administrator made without notice, are final.

133. The final account of an executor, allowed by the probate court, cannot be set aside for any irregularity or error in the proceedings; that could only have been done by appeal; it may however be impeached for fraud in obtaining it. *Smith v. Hurd*, 7 How. 188; it is final and conclusive after the term at which it is allowed. *Stubblefield v. McRaven*, 5 S. & M. 130.

134. An executor, after final accounting with the probate court, will, so long as he retain the office of executor, be still held amenable to that court, and required to account for all items which have originated since his alleged final account. *Smith v. Hurd*, 7 How. 188.

135. A settlement of his account by an administrator, made without giving the notice prescribed by the statute, is void. *Washburn v. Phillips*, 5 S. & M. 600.

136. Disbursements made by an administrator for the board and maintenance of the infant distributees, are not proper charges in his account against the estate, *Ib.*; and any judgment or decree allowing such account, is void. *Jones v. Coon*, 5 S. & M. 751.

137. Where a bill was filed in the superior court of chancery against an executor for the appointment of a receiver, on the ground of his mismanagement of the case, it was

held, without deciding whether that court or the probate court had power to appoint a receiver, that the settlement and accounts of the executor, allowed by the probate court, were *prima facie* correct, and could not be inquired into by the chancery court, the probate court having sole jurisdiction of the subject-matter. *Simmons v. Henderson*, Freem. Ch. 493.

c. *Who may administer; and herein of the right to administration, and the power of removal therefrom.*

138. A widow who is also a minor cannot, during her minority, be appointed administratrix of her husband's estate; when of age, she can, under the statute, claim her right of administration. *Collins v. Spears*, Walk. 310.

139. A motion to revoke letters of administration, on the ground that the administrator is not next of kin, can only be made by the next of kin. *Edmundson v. Roberts*, 1 How. 322.

140. The husband of an executrix, who intermarries with her after her appointment, may exercise all the powers of an executor without qualifying; but if his wife die, his power will cease, even though he may have qualified with his wife. *Ib.*

141. Where the probate court was empowered by the statute to appoint an administrator with the will annexed, only when the executor refused to account, or had become insane, the appointment of such administrator during the lifetime of the executor, when neither contingency contemplated by the statute has happened, will be absolutely void, and all his acts will be illegal and those of a trespasser;

and the records of the probate court must show that one or the other of such contingencies has happened, to render its action valid; and without that it will be a fatal defect to its jurisdiction. *Vick v. The City of Vicksburg*, 1 How. 479; *Doss v. Armstrong*, 6 How. 258; *Bergen v. Doss*, cited. *Ib.*

142. The husband or wife or distributees have, under the statute, a legal right to administer upon the intestate's estate, in the order pointed out by the statute; as among all others the probate court can exercise its discretion in appointing an administrator; and if it appoint one more remotely related to the deceased than another applicant, the appointment will not be disturbed. *Byrd v. Gibson*, 1 How. 568.

143. The probate court may remove an administrator from his office for good cause shown, without the intervention of any party; mere isolated acts of maladministration for which the parties in interest have ample security by action on the official bonds, are not sufficient cause of removal, unless future danger to the estate may be reasonably apprehended. Nor ought an administrator to be removed for incapacity or other causes which existed and were known when he was appointed. *Lehr v. Tarball*, 2 How. 905.

144. The next of kin is entitled to administration unless he come under one of the disqualifications of the statute; and where he applies for administration, the probate judge cannot refuse it on the ground that he is disqualified, in the opinion of the judge, by intemperance, unless the judge testify to the fact in court, under oath, that the applicant may have the opportunity of

disproving it, if possible. *Smith v. Moore*, 3 How. 40.

145. If the person entitled to administration be a minor, the probate court may appoint an administrator during such minority, who need not be of the next of kin; although the statute makes no provision for such case, yet the rule will be adopted from analogy to the law providing that if an executor be incapacitated, and the next of kin be a minor, administration *durante minoritate*, shall be granted by the court. *Pitcher v. Armat*, 5 How. 288.

146. Letters of administration, when once granted by the probate court, cannot be revoked without giving notice to the administrator thus appointed, of the application for revocation; where therefore D. W. had been appointed administrator of M.'s estate, and had qualified; and W., a creditor of M., by petition to the probate court, alleged that D. W. was wasting the estate, and that his bond was legally defective, and praying that D. W.'s letters might be revoked, and the prayer of the petition was granted without giving D. W. an opportunity to perfect his bond, and give other security, it was held to be erroneous. *Wingate v. Wooten*, 5 S. & M. 245.

147. The preference given to the widow, by the statute, of administering on her husband's estate, will not be destroyed by the fact of her having once administered on the estate, and then renounced her administration; or of her claiming causes of action against the estate which were denied by the heirs. *Pendleton v. Pendleton*, 6 S. & M.

448. The widow is entitled to administer, in preference to the son of the deceased, nor will her de-

clarations made to the son out of court of her waiving her right of administering and requesting him to administer, preclude her from changing her mind and asserting her right; and if the son of the intestate have taken out letters on the estate, and the widow, within the time allowed her by law, apply for letters and the removal of her son, she will be entitled to them. *Muirhead v. Muirhead*, 6 S. & M. 451.

148. As a general rule, when the probate court has conferred letters of administration, it cannot remove the incumbent, unless for some defined statutory cause. *Ib.*

149. On an application, by the widow, for letters of administration on her husband's estate, she read the copy of a decree divorcing her husband from a former wife, which was excepted to; *held*, that if error it could neither benefit nor prejudice either party, and therefore could not affect the decree of the court. *Ib.*

150. Where an application is made to the probate court to remove an executor for insufficient security on his bond, the sureties may prove their sufficiency by their own oath, like the qualifying of bail, which being done, it then devolved on the other party to show their insufficiency by other evidence. *Ross v. Mims*, 7 S. & M. 221.

d. *Administrator de bonis non, and herein of his powers and duties.*

151. An administrator *de bonis non* can maintain an action only for those articles which remain unadministered. *Kelsey v. Smith*, 1 How. 68.

152. The debt of an administrator to his intestate is not money in the hands of the administrator under the statute, unless he insert it in

the list of debts reported to the court; if he fail to do so, the probate court may, upon complaint of some one interested, by consent, decide upon the question of indebtedness, or may award an issue to the circuit court, in either of which cases he is to account for his debt as so much money, but where such administrator has ceased to act, and his debt to his intestate remains unpaid and unadministered by him, the administrator *de bonis non* may sue the first administrator upon it and recover on it as unadministered assets; *aliter* at common law, where *executor* is a debtor, there the debt at common law is extinguished by his appointment as executor. *Ib.*

153. An administrator *de bonis non* cannot sue upon the bond of his first administrator for any *mal administration* on his part; but can only sue upon it to recover the value of specific property of the intestate remaining in his or his representative's hands, which he or they refuse to deliver up. *Prosser v. Yerby*, 1 How. 87. The administrator *de bonis non* cannot sue the first administrator for a *de vastavit*; the extent of his commission being to administer the effects left unadministered. *Stubblefield v. McRaven*, 5 S. & M. 130; *Byrd v. Holloway*, 6 S. & M. 323.

154. An administrator *de bonis non* having power only to administer unadministered goods, cannot make a deed to land sold by the first administrator under the order of court. *Davis v. Brandon*, 1 How. 154.

155. Where an administrator dies and property of his intestate comes into the hands of his administrators, it must be sued for by the administrator *de bonis non* of the

first intestate; and not by his distributees; and the suit must be against them personally and not as administrators, and therefore their sureties on their official bond cannot be made parties to it. *Miller v. Womack*, Freem. Ch. 486.

e. *Bond of Executor and Administrator; when and how put in suit, and suit thereon.*

156. The failure of an administrator to inventory debts due by him may render him liable to an action on his bond. *Kelsey v. Smith*, 1 How. 68.

157. The right to put in suit the bond of an administrator is confined to legatees, distributees or creditors, and a party suing on such bond must shew in his pleadings the nature and extent of his interest. *Prosser v. Yerby*, 1 How. 87.

158. Where an administrator collected a sum of money of his intestate and reported it as on hand, and failed to pay it over to the administrator *de bonis non*, it is an act of mal-administration for which he may be sued on his bond, by one in interest but not by an administrator *de bonis non*; unless such money was the specific and identical money of the intestate, and even then, *quære?* *Ib.*

159. A sale by an administrator, without taking security for the purchase-money, is a breach of his bond. *Ib.*

160. In a suit on an executor's bond in the name of the probate judge to recover a legacy for the use of the assignee of the legacy, it is no bar to the action that such assignee is the administrator of one of the sureties on the executor's bond. *Judge of Probate v. Johnston*, 1 How. 297.

161. In an action on an adminis-

trator's bond at the suit of a distributee, the plaintiff must aver the execution of, or willingness to execute, a refunding bond; or in case of the final settlement of the estate, that fact must be averred, before he can recover against the administrator and his sureties on breaches of the bond for not accounting for money received by the administrator; the statute not requiring the administrator to pay distributees, except in one or the other of those alternatives; unless perhaps an averment that the orphans' court had made a decree of distribution and the administrator had failed to pay, would also entitle the distributee to recover. *Harmon v. Thompson*, 2 How. 808; *Carmichael v. Browder*, 3 How. 252.

162. It is a good breach in substance on an administrator's bond that "the administrator did not well and truly administer and account on the estate according to law, nor did he make or cause to be made a just and true account of his administration within twelve months, nor make such a showing as the law requires." *Ib.*

163. If an administrator have failed to return an inventory, or have received and not accounted for assets, he is liable on his bond. *Edmundson v. Roberts*, 2 How. 822.

164. The statute which requires bonds of executor and administrator to be made payable to the judge of probate constitutes the judge a *quasi* trustee for the parties interested and authorizes him to put the bond in suit for the use and benefit of those interested; if therefore the bond be sued upon, the declaration must shew for whose use the suit is brought and the character of the usee's interest. *Judge of Probate v. Johnson*, 4 How. 680.

165. In an action on an administrator's bond, it is necessary for the plaintiff to shew some mal-administration or *devastavit* on the part of the administrator, in administering his intestate's property ; where, therefore, B. was administrator of M.'s estate and died without having settled it up ; and P. administered on B.'s estate and the distributees of M.'s estate moved against P. to settle B.'s administration of M.'s estate and distribute it ; and the probate court decreed P. to distribute M.'s estate, fixing the sum to be distributed among M.'s distributees ; and M.'s distributees sued P. and his sureties on the administration of P. as administrator of B.'s estate, alleging as a breach this decree of the probate court and the non-payment by P. of the amount decreed to be distributed : *held*, that the breach was not well assigned ; that B.'s estate was not liable to the distributees of M.'s estate until a judgment for an act of *devastavit* had been rendered against B. and that therefore B.'s administrator could not be sued until such *devastavit* and judgment were established. *Judge of Probate v. Phipps*, 5 How. 59.

166. The probate court cannot proceed by bill or otherwise against the sureties on the administrator's bond ; that bond can only be put in suit in the circuit court, after proper steps had, to fix the liability of the administrator. *Green v. Tunstall*, 5 How. 638.

167. In a breach on an administrator's bond it is not necessary, in order to shew a *devastavit*, to allege the particular kinds and qualities of the goods and chattels which came to the hands of the administrator ; it is enough if it aver that goods came to his hands, of an amount,

specifying their value, which was greater than that claimed by the creditor at whose instance the bond was put in suit. *Hoggatt v. Montgomery*, 6 How. 93.

168. Where a declaration on an administrator's bond, averred the reception of assets by the administrator and that he had wasted them, and that the plaintiff had recovered a judgment against the administrator for a specified sum, which remained unpaid, and the defendant demurred to the declaration and the demurrer was overruled ; *held*, that the judgment on the demurrer should be final without the intervention of a writ of inquiry for the amount of the judgment and interest. *Ib.*

169. Sureties on an administrator's bond, who have petitioned the probate court for relief and that the administrator might be compelled to give other security, are, after other security has been given, absolutely discharged from all liability ; and they may plead the new bond in bar of any action brought on the old bond. *Russell v. M'Dougall*, 3 S. & M. 234.

170. A suit upon an administrator's bond cannot be maintained in the probate court, the remedy thereon is at law ; the application to the probate court to have the bond declared forfeited and put in suit, is intended by the statute to be *ex parte* in its character ; and the sureties on the bond have no right to contest their liability, in that stage of the proceeding. As a general rule, the probate court should, on application, allow the administrator's bond to be put in suit ; the instances are few in which the leave should be refused. *Washburn v. Phillips*, 6 S. & M. 425.

171. The sureties of an admin-

istrator on his official bond cannot be sued in equity by a judgment creditor, for a *devastavit* committed by him; the remedy is by action at law on the bond. *Buckingham v. Owen*, 6 S. & M. 502.

f. *Commissioners of Insolvency; and referees of claims appointed by the probate court, and the effect of their action thereon.*

172. Where a claim against a deceased person's estate has been referred to referees, under the statute, and they have reported in favor of the claim, and their report has been confirmed by the probate court; such report and confirmation are conclusive of the validity of the claim; and it cannot be impeached in a subsequent suit against the administrator, on his bond, for the use of the holder of such claim. *Shropshire v. Judge of Probate*, 4 How. 142.

173. The report of the commissioners of insolvency, on an insolvent estate, for the allowance and settlement of claims against it, under the statute, is final and conclusive, after the term of the court to which it is returned; objections must be taken to the report at that term, by exception, it cannot be done afterward. *Chewning v. Peck*, 6 How. 524; *Smith v. Berry*, 1 S. & M. 321; *Addison v. Eldridge*, *Ib.* 510; *Powell v. Carbry*, 4 S. & M. 86; *Harrison v. Motz*, 5 S. & M. 578. The commission cannot be opened after the term, for any cause, unless the former orders were *null and void*; where, therefore, H. filed his petition in the probate court, alleging that R. died in 1839, that his estate was reported insolvent in 1840, and commissioners appointed, who reported in July, 1841; that the petitioner, in

1843, had become a creditor of R.'s estate, by being compelled to pay a note on which he was surety for R., and that the estate was still in the administrator's hands, undistributed, and prayed that the commission be reopened, *held*, that H.'s duty was to have paid the note on which he was surety, at an earlier date in time, to lay before the commissioners, or have caused the holder to present it, and save the bar; having failed in which, his application came too late, and could not be allowed. *Herring v. Weltons*, 5 S. & M. 354. So, also, the estate of H. was declared insolvent in 1839, and commissioners appointed, who reported in 1841, and their report allowed. In June, 1843, M. applied to have the commission reopened, and his claim admitted, which was reduced to judgment against the administrator, in 1842; *held*, that the application came too late; the claim on which his judgment was founded, should have been presented to the commissioners, failing which, it was barred. *Harrison v. Motz*, 5 S. & M. 578. The commission cannot be reopened for any cause, unless the former order is void. *Dahlgren v. Duncan*, 7 S. & M. 280. The rule is the same with reference to the report of auditors. *Freeman v. Rhodes*, 3 S. & M. 329. So with reference to the final settlement of executors and administrators. *Stubblefield v. McRaven*, 5 S. & M. 130; *Jones v. Coon*, *Ib.* 751; and in fact with all judgments and decrees of the probate court; they cannot be opened or inquired into at a subsequent term. *Alexander v. Smith*, 4 S. & M. 258; *Hendricks v. Hudleston*, 5 S. & M. 422.

174. R., alleging himself to be a creditor of M.'s estate, laid his

claims before the commissioners of insolvency, who rejected them; when R. had them referred to referees, under the statute, who also reported against them, and the probate court confirmed their report. At a *subsequent* term it was agreed by the attorneys of both parties, that the claims should be again referred for another report, and depositions were taken on both sides, and neither party objected to the order for a second reference, during its pendency in the court below; *held*, that the acquiescence of the parties in this second reference, and their action under it, precluded any objection to it in the high court. *Reed v. Wiley*, 5 S. & M. 394.

175. The provisions of the statute, in regard to the appointment of referees for the allowance of claims against insolvent estates, is, so far as relates to creditors, subsidiary to the appointment of commissioners of insolvency, and is only called into exercise when the claim has been submitted to the commissioners, and has been in whole or in part, rejected. *Smith v. Berry*, 1 S. & M. 321.

176. It is not necessary, before the probate court can declare the estate of a deceased person insolvent, and appoint commissioners to audit and allow claims under the statute, that an order should have been previously obtained, directing a sale of the deceased's realty; the probate court has a discretion in declaring estates insolvent which, when exercised, is conclusive, unless a direct appeal is taken; and it may declare the estate insolvent, when, from a comparison of the debts presented to the administrator, and an estimate of the probable value of the whole estate, real and

personal, it appears that the amount of debts is greater than the probable value of the property. *Saunders v. The Planters Bank*, 2 S. & M. 287.

177. Where commissioners of insolvency have been duly appointed, and fail to make their report at the expiration of their period of appointment, and the probate court fails at that time to extend their time to report in; but afterward, and within eighteen months from their first appointment, does extend the time, and the commissioners subsequently report, and their report is received and confirmed; it will be valid, and the proceedings regular; their report, at any time after the expiration of their period of action, within eighteen months from their date of appointment, will be valid. *Ib.*

178. The statute, requiring commissioners of insolvency to post notices of their appointment in such public places, and to publish them in such newspapers as the court may direct, leaves it discretionary with the court to direct the mode of notice, and where that directs it in a newspaper only, and the order is followed, it will be sufficient, though no notices be posted in public places. *Ib.*

179. If the commissioners of insolvency refuse to report upon the condition of the estate, the probate court has ample power to compel them to do so; but cannot entertain a bill by the creditors for that purpose. *Harris v. Fisher*, 5 S. & M. 74.

180. It is not necessary that it appear of record, that the report of the commissioners of insolvency was made under oath; or that the advertisement of their meeting was made according to the direction of the court; these are matters of evi-

dence for the court below ; and in the absence of an affirmative statement in the record, that they were not done, the high court will presume the law and orders of the court below on the subject, to have been fully complied with. *Herring v. Wellons*, 5 S. & M. 354.

181. The proceedings in the probate court, in the settlement of claims against an insolvent estate, by referees, are analogous to those on a reference to a master in chancery ; and where the report of such referees is confirmed, it is final as to the action of the probate court ; but is subject to reëxamination by the high court, upon the law and facts. *Reed v. Wiley*, 5 S. & M. 394.

182. Upon the conflict of testimony before referees, sitting upon a claim against an insolvent estate, where payment of the claim was alleged, and there were various and independent dealings between the claimant and the deceased, which rendered it difficult to ascertain what sum was due, *held*, to be a case peculiarly proper for an issue before a jury. *Ib.*

183. R. holding the notes of M. for large sums, due in 1836, upon which large payments were made in 1838, 1839, and 1840, laid the claims before the commissioners of insolvency on M.'s estate, in the year 1841, in which year M. died ; the claims were rejected ; upon which referees were appointed, who proceeded to take proof, by which it appeared that M. and R. were once in partnership ; that M., in 1837, settled a debt for R. equal to M.'s debt due to R. in 1836 ; that M., in 1836, had collected large sums of the partnership debts of M. & R., equal to the debt of R.'s, which M. had paid in 1837 ; it did

not appear that M. had ever paid to R. any of these partnership sums so collected, but in 1838, 1839, and 1840, made large payments upon the notes due in 1836, held by R. Upon this proof the referees rejected R.'s claim, and the probate court confirmed their report ; *held*, that the clear proof of the once subsisting debts due by M. to R., and the want of clear proof of its payment, rendered it more subservient to the ends of justice, that the report of the referees should be recommitted to them for a second examination ; in which, however, they were to be influenced by their own estimate of the testimony. *Ib.*

184. Where claims against the estate of a decedent were referred, by the probate court, to referees, who made a report which was received and confirmed, and the parties by an agreement entered of record in the probate court, agreed that the former order appointing referees, and also their report be set aside and the claims in controversy referred to other referees ; which was done, and they reported in favor of the claims, and their report was approved and confirmed by the court ; it was *held*, that if any objection existed to the original appointment of referees, the party waived it by agreeing to set aside their appointment and report, and to the appointment of other referees. *Regan v. Stone*, 7 S. & M. 104.

185. In an action upon an administrator's bond, the bond is but inducement to the action, and no recovery can be had upon it without proof of damages ; without such proof it is not a valid claim against an insolvent estate or against any one ; a report of referees, therefore, to whom a claim

against an insolvent estate was referred, which shows that the amount of the penalty of an administrator's bond was allowed as a valid claim against the estate, without any proof of a breach of the bond, or of damages sustained by the parties interested, is erroneous on its face. *Green v. Creighton*, 7 S. & M. 197.

186. Referees to whom a claim against an insolvent estate, is referred by the probate court, are not bound to report the evidence on which they found their report; yet in all cases they ought to do so, as that is the only way by which the judgment of the appellate court can be had, or the validity of the claim referred to them. *Ib.*

187. Where a claim was rejected by commissioners of insolvency, and afterwards referred by the probate court to referees and by them allowed and the report set aside by the probate court on exceptions to it; held, that the decree setting aside the report of the referees was not conclusive against the validity of the claim, and it was competent for the probate court to recommit the claim to referees. *Ib.*

g. *Devastavit.*

188. A *scire facias* may be sued out against an executor or administrator on a judgment against him, as such, to make him liable *de bonis propriis* for a *devastavit*; but in such case there must be proof of a *devastavit*; and the mere allegations in the *scire facias* will not justify a judgment final by default. To such *scire facias*, being in the nature of an original action, the executor may make his defence by plea. *Sims v. Nash*, 1 How. 271.

189. Executors and administrators are not liable in this state, beyond the amount of assets, for any

omission in pleading, false pleading or mis-pleading; a judgment or decree, therefore, against administrators as such, will be no evidence of assets; and in a proceeding against executors or administrators suggesting a *devastavit*, even in England, the judgment against them, without the execution and return of *nulla bona* and a *devastavit*, would not be sufficient to charge them personally. *Vick v. House*, 2 How. 617, to same effect. *Howard v. Cousins*, 7 How. 114.

190. In proceedings to make an administrator liable for a *devastavit*, a judgment against him as administrator, will be erroneous. *Ib.*

191. In an action against an administrator to render him individually liable for a *devastavit*, in not paying a judgment against him, he may plead and show that he has fully administered, even though he has not declared the estate insolvent; for not having declared the estate insolvent and thus produced an equal distribution among creditors he might be liable on his bond, but not in a proceeding for a *devastavit*. *Ib.*

192. See *infra*, *Executors and Administrators*, tit. *Insolvent Estates*.

193. If an executor, against whom as such, various judgments have been obtained, use the assets of the estate of his testator in the payment of the junior judgments against him as such executor, leaving the eldest judgment unpaid, he will be guilty of a *devastavit*; and will be liable to a proceeding against him by *scire facias*, as such executor, to subject him to the payment *de bonis propriis*, of the judgment recovered against him as executor, and thus left unpaid; in such case, the *scire facias* should state what

amount of assets had come to the hands of the executor, as he would not be liable beyond that sum; and he may plead to such *scire facias*, notwithstanding the former judgment against him, *plene administravit*, and will be discharged if he can show a full and proper administration of the estate; such plea will not, however, be supported if there has been a misapplication of assets. *Black v. Barton*, 6 S. & M. 239.

h. *Insolvent estates; and herein of the report of insolvency.*

194. An administrator may report the estate of his intestate to be insolvent at any time within the period when claims may be brought against the estate; if he so report it at a later period it will be a suspicious circumstance; and if a judgment has been obtained against an administrator, before a declaration of insolvency, such judgment will, after such declaration, be stayed by the court in which it is rendered, on proof of the declaration of insolvency, under that provision of the statute which says that no action shall be commenced or *sustained* against the administrator after the estate is reported insolvent. *Parker v. Whiting*, 6 How. 354; and a court of chancery will enjoin such execution. *Neibert v. Withers*, 1 S. & M. Ch. 599. It is otherwise however, if the judgment be rendered in the lifetime of the intestate. *Dye v. Bartlett*, 7 How. 224.

195. It seems that the action of the probate court upon a representation of insolvency by an administrator of the intestate's estate, is conclusive upon the circuit court, and it will not therefore be error for that court to refuse to hear

testimony to show that such report was improperly or improvidently made; it not being attacked for fraud. *Ib.* It seems that on a bill to enjoin an execution on the ground of the insolvency of the estate, it will be no answer that the declaration of the insolvency was procured even by fraud. *Neibert v. Withers*, 1 S. & M. Ch. 599.

196. Where an insolvent estate is indebted to a bank whose notes are below par, and the administrator seeks to pay the debt in the notes of the bank, a mode of reaching the object is to except to the report of the commissioners of insolvency, and have the claim of the bank referred to referees, to whose report the exception raising the point might be taken; another mode would be for the administrator to have required a suit at law upon such claim, and frame the pleadings therein so as to reach the point at issue; whether such an end could be obtained by the administrator permitting himself to be sued on his bond for a *devastavit* and making a set-off to the debt due to the bank of its own notes; *Quære?* *Robins v. Norcum*, 4 S. & M. 332.

197. If an administrator after the estate is reported insolvent, discharge debts not privileged, the payment is illegal and he is guilty of a *devastavit*; but the probate court has no other control over him for it, except to refuse to allow his accounts or to remove him from office; the remedy for a *devastavit* is in another forum. *Harris v. Fisher*, 5 S. & M. 74.

198. Under the statute of this state, which provides "that when a person dies insolvent his estate both real and personal, shall be distributed to and among all the

creditors in proportion to the sums to them respectively due and owing," taken in connection with the statute that makes "all contracts and liabilities of co-partners joint and several," the debts due by a deceased person individually, and as a partner will stand on exactly the same footing and be entitled to equal satisfaction out of the insolvent's estate; in such case if the creditor of the partnership have sued the surviving partners, and procured payment of any portion of the debt, the estate of the deceased will be entitled to the benefit of it; if the creditor look only to the estate of the deceased, and that pays more than its proportion, the representatives of the estate will stand in the place of the creditor and be substituted to his rights with reference to the other partners. *Dalghren v. Duncan*, 7 S. & M. 280. (Chancellor Buckner decided differently in *Arnold v. Hamer*, Freem. Ch. 599; *Oakey v. Rabb*. *Ib.* 546.)

199. See *Set-Off*, 30; what is good set-off against debt due to insolvent estate.

200. Pending a bill filed by an administrator, to ascertain to whom notes secured by a mortgage made by his intestate should be paid, the estate of the mortgagor was declared insolvent, which fact was made the matter of a supplemental bill by the administrator; *held*, that the insolvency of the estate did not suspend the action of the court, in granting a decree, in the case of the right of a successful litigant to a sale of the mortgaged premises to pay the debt. *Cannon v. Kinney*, 1 S. & M. Ch. 555.

201. It is not necessary before an estate of a deceased person can be declared insolvent, that the real

and personal estate of the deceased should be sold and reduced to money; it is sufficient if the administrator or executor, from a comparison of the probable value of the real and personal estate, with the debts, shall deem the estate insolvent and so represent it. *Neibert v. Withers*, 1 S. & M. Ch. 599.

202. After an estate has been declared insolvent, a suit can only be maintained against it on a bill averring that the declaration of insolvency had been procured by fraud. *Miller v. Womack*, Freem. Ch. 486.

i. *Revival of suits and judgments against Executors and Administrators; and herein of sale of the decedent's property without revival.*

203. See *Execution*, 1, 2. Execution against administrator on judgment against intestate, without revival, is irregular. *Hicks v. Murphy*, Walk. 66; *Hubert v. Williams*, *Ib.* 175.

204. See *Execution*, 3; as to right to issue execution after death of defendant, without revival. *Wilson v. Kirkland*, Walk. 155.

205: Where one of the defendants (a non-resident) to a suit in the supreme court, dies, the suit may be revived by publication under direction of the court. *Dismisses v. Terry*, Walk. 180.

206. See *Chancery*, 30; as to power of administrator *ad colligendum* to revive bill.

207. *Scire facias* against an administrator to revive a suit against his intestate is not in the nature of an action and may be prosecuted previous to the expiration of nine months from the grant of letters of administration, in which period there

is an inhibition against suits. *Breck-enridge v. Mellon*, 1 How. 273.

208. On *scire facias* to revive suit against two defendants, and service on one only, judgment against both will be irregular. *Ib.*

209. On *scire facias* to revive, judgment should be rendered against the administrator in his representative capacity. *Ib.*

210. A sale under execution against an intestate, without revival against his administrators, in case of personalty, or heirs, in case of realty, is *voidable only* and not void, and cannot be collaterally attacked. *Smith v. Winston*, 2 How. 601.

211. It seems that in this state, making all contracts joint and several, and making them survive against the representatives of the deceased contractor, a joint action may be brought against the surviving obligor and the representatives of such deceased obligor; *Jones v. Stanton*, 7 How. 601; *sed aliter*; the executor of a deceased maker cannot be jointly sued with the surviving maker. *Poole v. M'Leod*, 1 S. & M. 391; but in the case of a writing obligatory, if one die pending the suit, the action may be revived against his representatives, and proceed thus revived against them and the survivor jointly, and judgment accordingly be rendered against them; so a joint suit may be prosecuted against the survivors and the representatives of a deceased obligor. *Henderson v. Talbert*, 5 S. & M. 109; so, also, the rule is the same with reference to the joint makers of a promissory note, where one has died. *Woodhouse v. Lee*, 6 S. & M. 161.

212. L. sued S. and H. and P. and M. upon a joint note; M. died during the progress of the suit and before judgment; whereupon L.,

having brought the administrators of M. before the court by *scire facias*, dismissed the suit against the other parties, and took judgment against the administrators of M.; *held*, that the proceedings were regular and proper. *Ib.* 6 S. & M. 161.

213. Where a party defendant, who has pleaded to the action dies during the progress of the suit, and his administrators are brought in by *scire facias*, the plea filed during the life-time of the intestate will be the plea of the administrators, if they omit to file a plea to the *scire facias*. *Ib.*

j. *Sales by Executors and Administrators; their requisites and what passes thereby.*

214. Executors and administrators can only sell the property of the decedent in the mode prescribed by law; a *private sale*, therefore, by an administrator, of a slave of his intestate, passes no title; and the vendee will be compelled to yield the property to the right of the distributees. *Cable v. Martin*, 1 How. 558; *Idem*, *Baines v. M'Gee*, 1 S. & M. 208. And if the return of sales by an administrator do not show upon its face that they were made according to the statute, it may be attacked, and it may be shewn by parol evidence that they were not so made. *Worten v. Howard*, 2 S. & M. 527.

215. Where the administrator in right of his wife, who was a distributee of the estate, was entitled to one-third of the property sold by him at private sale, the vendee would acquire title to that extent; her interest in the property by the husband's possession as administrator becoming his in his own right. *Cable v. Martin*, 1 How. 558; *Baines v. M'Gee*, 1 S. & M. 208.

216. Where an executor sells, by order of the probate court, land of his testator, and it is at the time subject to the general lien of a judgment against the testator, and the purchaser at such sale takes a deed from the executor without covenants of warranty, and the land is afterwards sold under the execution against the testator without revival of the judgment, the purchaser at executor's sale can have no relief when sued for the purchase-money; he took a deed without warranty and must risk defects in title. *Smith v. Winston*, 2 How. 601.

217. An illegal sale by an administrator does not change the title. *Edmundson v. Roberts*, 2 How. 822.

218. An administrator's sale of the realty of his intestate, made under a decree of the probate court, rendered without the notice to those interested, required by the statute, passes no title to the vendee; such sale is absolutely void; and when the vendee is sued for the purchase-money he may show by the record of the probate court his want of title, and thus establish the entire failure of consideration of the note. *Campbell v. Brown*, 6 How. 106; *Ib.* 230; and no eviction is necessary to enable the vendee to make the defence. *Puckett v. M'Donald*, 6 How. 269; and the records of the probate court must show that legal notice had been given. *Gwin v. McCarroll*, 1 S. & M. 351; yet if a purchaser object to the validity of such sale he must produce the record; his mere allegation will not do; the probate court will be presumed to have exercised its discretionary power to order the sale properly until the contrary appear, which must be shewn by the object-

tor. *Smith v. Denson*, 2 S. & M. 326; *Ib. Laughman v. Thompson*, 6 S. & M. 259; when, however, the record is produced it must show affirmatively that everything necessary to give the court jurisdiction was performed, or the sale will be void. *Laughman v. Thompson*, 6 S. & M. 259; and the recitals in the record that "publication had been made in pursuance of the order," would be, even if evidence of publication, no evidence that citation had been posted up at three public places. *Planters Bank v. Johnson*, 7 S. & M. 449.

219. The probate court has power, at the term next subsequent to an administrator's sale, to set such sale aside for fraud; where an administrator sold property of his intestate for about one-fourth of its appraised value, under circumstances which evinced a fraudulent combination on the part of the administrator and purchaser, to prevent bidders from attending the sale and to buy in the property for the family of the intestate, without regard to the rights of creditors, such sale will be fraudulent and will be set aside by the probate court. *Planters Bank v. Neely*, 7 How. 80; the sale of realty by an administrator is not final until reported to and confirmed by the probate court. *Smith v. Denson*, 2 S. & M. 326; such a sale cannot be set aside for fraud at a subsequent term. *Turnbull v. Endicott*, 3 S. & M. 302.

220. C. died possessed of real estate; in 1821 the legislature passed an act authorizing C.'s administrator to sell the land upon terms and conditions prescribed, and to invest the proceeds as in his discretion would be most judicious for the widow and heir; the administrator sold the land, and in

1838 C.'s heirs filed a bill to set the sale aside; *held*, that the sale, if regular, was valid and passed title; the act of the legislature not being unconstitutional. *Williamson v. Williamson*, 3 S. & M. 715.

221. Where a private act of the legislature to sell real estate of a deceased person, was obtained upon the representation that the personalty was insufficient to pay the debts, and it turned out that the personalty was more than enough, including the price of a slave bought by the widow, but not enough exclusive of that price, *held*, that the representations were not fraudulent, and the act was not null by reason thereof. *Ib.*

222. Where a sale of an intestate's property is authorized by act of the legislature prescribing the terms thereof, those terms must be strictly complied with, or the sale will be void. Where, therefore, such a sale was authorized, on the administrator's giving bond, among other things, "to vest the proceeds of the sale in other property," and that condition was not inserted in the administrator's bond, *held* that the condition was not supplied by another condition in the bond, "to account for the proceeds," and that for want of the required condition in the bond, the sale by the administrator would be void, unless upon a complete subsequent compliance therewith on his part; and if not subsequently complied with, the purchaser would be regarded as a trustee for the heirs; and a purchaser, without notice for a valuable consideration from the original purchaser, will be regarded in the same light. *Ib.*

223. Where such sale has been made illegally, and the sale is set aside on the application of the heir,

an account of the rents of the land will be ordered to be charged to the purchasers, and they will be credited with the value of all permanent improvements, so it do not exceed the value of the aggregate rents. *Ib.*

224. Where the realty of an intestate, who has but a bond for title when the purchase-money is paid, and who has paid but a part thereof, is sold by an administrator, without due notice, and the purchaser has executed his note, payable to the person to whom the residue is due, for the price bid at the sale, he may notwithstanding avoid the note, as the sale was absolutely void, and did not divest the intestate's right. *Planters Bank v. Johnson*, 7 S. & M. 449.

225. In the case of the sale of the real estate of a deceased person, the record of the probate court must show that all the proceedings were regular, and that the citations were published according to law; but such degree of strictness is not however necessary in the sale of chattels which go to the administrator to be administered; in such case, even though the record do not show that citations were published according to law, the sale will be valid, and that though there be a lease for ninety-nine years which is sold; such leasehold interest being but a chattel and going to the administrator. *Dillingham v. Jenkins*, 7 S. & M. 479.

226. The creditors of an estate have the first claim upon the property in the hands of the administrator, and it is his paramount duty to protect their interest by using every effort to make the property under his charge sell for the best price that can be had for it. *Pearson v. Moreland*, 7 S. & M. 609.

227. An administrator cannot purchase at his own sale, either directly or indirectly; nor can he sell under a secret trust or private understanding that he is to have an interest in the property or derive a benefit from the sale; nor can he dispose of it for the benefit of his private friends; it is devoted by law to particular purposes, and it is a breach of trust in him to permit counteracting interests to divert it from its legitimate destination or to diminish its value. *Ib.*

228. M. and his wife, as administrators of W., sold a large amount of W.'s property to S., who was the sister of M.'s wife, and a member of his family; several creditors of the estate objected to the probate court's confirming the sale, on the ground of fraud; it was proved that the property sold for less than one-third of its appraised value and worth; that there were only four persons present when the sale commenced; that it was proclaimed on the ground, that persons were coming to the sale who wished to buy property that was to be sold, and were expected to arrive very soon, and who did arrive soon after the sale; that the administrator hearing of their expected arrival, instructed the auctioneer to proceed forthwith with the sale; that only one person besides S. bid at the sale, and he only on one lot of negroes; that his bid seemed to produce great surprise, and he was immediately taken aside and informed that the claim of his brother for whom he was acting should be secured in full, if he would agree to bid no more, to which he assented, and accordingly the note of S., with security, was given for the amount of his brother's debt; *that the claim of another who resisted the

debt was also compromised, and the note of S., with security, given for it; that a witness who attended the sale was told before it commenced, that S. was expected to purchase the property; S. was crying during the sale, and appeared very much affected when the bid was made in opposition to her; and that M. had said he did not think any body would bid against the children or him, and he expected to get the property very low; *held* that the sale was fraudulent in law and fact, and ought to be set aside. *Ib.*

229. The probate court may, on motion to confirm a report of sale by an administrator, set the sale aside for fraud, and order a resale without notice to the fraudulent purchaser. *Ib.*

230. An administrator being bound to follow strictly the law regulating the sales of property of his intestate, cannot take from a purchaser thereof the note of a *third* person in payment, as the statute, by requiring the purchaser to give *bond with approved security*, meant the purchaser's bond. *Steger v. Bush*, 1 S. & M. Ch. 172.

231. C. filed his bill, alleging that B., as administrator, sold a lot of ground of his intestate, to him, representing that he had full power to sell, when in fact he had none, and no order of court had been obtained for that purpose; that he had executed his note for the purchase-money; had been sued, and judgment been obtained against him; that he did not know until after judgment that B. had had no power to sell, and that he had no order for that purpose; B. demurred to the bill; *held* that the bill presented a good case for relief; that B. was guilty of fraud in the misrep-

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resentation, and that the demurrer must be overruled. *Crisman v. Beasley*, 1 S. & M. Ch. 561.

232. Where an administrator sells property of his intestate, there is an implied covenant with the purchaser that he has authority to sell. *Ib.*

233. It is essential to the validity of an administrator's sale, that the probate record disclose a substantial compliance with the requirements of the statute on that sub-

ject. *Ib.*; and where it does not, the purchaser can obtain an injunction against a payment of the purchase-money. *Lowry v. McDonald*, 1 S. & M. Ch. 620.

234. Where an administrator sells land to which his intestate had no title, whether the error occurred from fraud or mistake, the purchaser will be entitled to relief, and the sale set aside. *Ives v. Pier-son*, Freem. Ch. 220.

F. *Ferry - see Franchise*

FIXTURES.

1. Where one builds a house upon the lands of another, by his license, though given in parol, he may remove the house; if, however, one build on the lands of another without license, he may not remove them, and it seems if he do so, he will be liable to the owner of the soil in an action of trover, for the value of the house thus removed. *Stillman v. Hamer*, 7 How. 421; *Terry v. Robins*, 5 S. & M. 291.

2. It seems that a still in a still-house, and in use, and attached to the still-house, is a personal chattel; and it is not necessary for the relation of landlord and tenant to exist, to warrant its being treated and considered as a personal chattel, so as to authorize its removal. *Terry v. Robins*, 5 S. & M. 291.

FORBEARANCE.

1. Mere forbearance, without consideration, does not discharge surety. *Montgomery v. Dillingham*, 3 S. & M. 647.

2. Where forbearance to sue is the consideration of the contract, the suit should be brought on that consideration, and not the original indebtedness. *Ib.*

FORCIBLE ENTRY AND DETAINER.

1. In a proceeding for forcible entry and detainer, the complainant must describe the estate entered upon. *Lewis v. Sulzer*, Walk. 21.

2. The time of trial of an action of forcible entry and detainer, must accord with that stated in the summons. *Ib.*

3. In a trial of forcible entry and

detainer, the title to the land in controversy cannot be established by parol. *Ib.*

4. The complaint in an action of forcible entry and detainer must be addressed to some justice of the peace. *Ib.*

5. It is error for the justice, without any cause being assigned, to reject a juryman summoned to try an action of forcible entry and detainer, and to summon a talesman in his stead. *Ib.*

6. Administrator cannot maintain forcible entry and detainer. *Carmichael v. Davis*, Walk. 221.

7. Under the proceedings for a forcible entry and detainer, the plaintiff may show his right of possession, though he has never had actual possession; and a judgment in this proceeding, is no evidence in action of trespass, or ejectment. *Spear v. McKay*, Walk. 265.

8. Adverse possession for three years prior to the commencement of the suit for forcible entry and detainer, or unlawful detainer, bars the suit, under the statute; but the possession must be adverse; where, therefore, A. contracted to sell B. land, and puts him in possession; the title to be made when the purchase-money is paid, and B. refuse to pay the purchase-money; A. may maintain his suit for unlawful detainer at any time within three years from such refusal. *Loring v. Willis*, 4 How. 383.

9. The writ for unlawful detainer is a possessory action merely, and the title of the parties, and the right of property, are not involved in it. *Ib.*

10. The justice's court to try an unlawful detainer, is only a court for the occasion; after they have rendered their judgment, therefore, they cease to exist, and a writ of

error will not lie from the high court of errors and appeals to them; the remedy for their decision is by appeal, as given by the statute, to the circuit court. *Robertson v. Williams*, 6 How. 579.

11. In an action of unlawful detainer, the plaintiff introduced a witness, and proposed to prove "that the defendant did unlawfully withhold a tract of land and tenement from him, as described in the affidavit;" held, that the testimony should have been admitted. *Torrey v. Cook*, 3 S. & M. 60.

12. If the affidavit required in this action be in the language of the statute, it will be sufficient, and it need not specifically describe the property; nor need the proof be more specific than the affidavit. *Ib.*

13. In the action of unlawful detainer the oath required by the statute must be administered to the jury, and it must appear of record, affirmatively; the language that the jury find upon their oaths, is not sufficient; and if the jury were not sworn to find "whether the plaintiff had the right of possession," it will be a fatal defect, though the verdict be full, in the words of the statute. *Holt v. Mills*, 4 S. & M. 110.

FORTHCOMING BOND.

1. Under the statute, a forthcoming bond, while the execution remains unquashed, is a complete satisfaction of the original judgment. *Stewart v. Fuqua*, Walk. 175; *Connell v. Lewis*, *Ib.* 251; *Sampson v. Breed*, *Ib.* 267; *Reeves v. Burnham*, 3 How. 25.

2. A forthcoming bond is a statutory judgment, and therefore an

execution on it will not be quashed, because the sheriff neglected to make the money, on a levy of an execution on the original judgment. *Hubert v. McGahey*, Walk. 246.

3. The statute, with reference to forthcoming bonds, is to be strictly pursued; such a bond should show to whom the property levied on belonged, and if from that showing it should appear that the property levied on was not subject to the execution, as, for instance, a levy on the individual property of an executor, to satisfy a judgment against his testator, the bond should be quashed. *Jones v. Miles*, 1 How. 50.

4. A forthcoming bond, when forfeited, is a satisfaction of the original judgment; an injunction, therefore, against the original judgment, will not excuse the sheriff from levying and making the money on a forthcoming bond, given and forfeited on such judgment, and he will be liable to the parties, on motion, for not having done so. *Davis v. Dixon*, 1 How. 64; *Weathersby v. Proby*, Ib. 98. And after forfeiture of the bond, a second execution, levy and bond, on the original judgment, are void. *Witherspoon v. Spring*, 3 How. 60. After bond given, and forfeited, therefore, the original judgment cannot be amended. *Burns v. Stanton*, 2 S. & M. 457.

5. Upon a motion to quash an execution on a forthcoming bond, defects in the bond or original judgment, cannot be taken advantage of; a motion to quash the bond is the remedy. *Ib.* On a motion to quash a forthcoming bond, the question of the regularity or irregularity of the original judgment, cannot be inquired into; nor, it seems, can the question, whether

there be no original judgment, or whether it be void, be looked into; the judgment on the bond precludes all inquiry behind it; therefore, a recital in the record that "P. confessed judgment in favor of P. D. & Co. for \$11,000, April 14th, 1847;" upon which an execution issued, and a bond was taken and forfeited, will not be inquired into, as to whether it is a valid judgment or not. *Bank of the United States v. Patton*, 5 How. 200. So, also, an informal judgment will uphold the bond, such as this: "Pleas withdrawn, and judgment by default final, for \$1168 44." *Miller v. Patton*, 3 S. & M. 463.

6. The fee-bill of the executions, on the original judgment, need not be appended to the execution on the forthcoming bond; the forfeiture of that bond being a satisfaction of those costs and the original judgment. *McIntyre v. Weathersby*, 1 How. 331.

7. A forthcoming bond no part of record, unless made so by bill of exceptions. *Grigsby v. Francis*, 2 How. 845; *Kerr v. Robertson*, 5 How. 278; *Merrett v. Vance*, 6 How. 498; *Briggs v. Clark*, 7 How. 457; *Sprawles v. Barnes*, 1 S. & M. 629. And will not be noticed, even when spread out in the record, unless by bill of exceptions. *Huston v. Hayter*, 6 How. 580; *Mattheney v. Totten*, 2 S. & M. 52. See *Bill of Exceptions*, 6.

8. See *High Court of Errors and Appeals*, 4; for jurisdiction of case, after forfeiture of bond.

9. Where there are three parties to a judgment, and only two have executed a forthcoming bond, the original judgment will not be obligatory on the party who has not joined in the bond. *Sanders v.*

McDowell, 4 How. 9. And an execution on the judgment against him, will be void. *King v. Terry*, 6 How. 513; *Field v. Morse*, 1 S. & M. 347.

10. A forthcoming bond becomes forfeited on the day appointed for the delivery of the property; if it be not delivered, it has the force and effect of a judgment from that time. *Minor v. Lancashire*, 4 How. 347; *Jones v. Mississippi and Alabama Railroad Co.* 5 How. 407.

11. The forthcoming bond law is constitutional. *Wanzer v. Barker*, 4 How. 363.

12. The return by the sheriff, on the *fi. fa.* on which a bond is taken, "*bond taken and forfeited*," is a sufficient return of the forfeiture of the bond. *Ib.*

13. The defendant cannot move to quash a forthcoming bond after the return term thereof. *Ib.*; *Kerningham v. Scanland*, 6 How. 540. And a judgment of the court, quashing the bond after its return term, will be void, and an execution on the original judgment, issuing after such quashal, will be quashed. *Field v. Morse*, 1 S. & M. 347; *Conn v. Pender*, *Ib.* 386. And after the bond is thus illegally quashed, an execution may still issue upon it; and if such void judgment, quashing the bond, be affirmed by the high court, from a defect in the record, it will still be void, and an execution may lawfully issue on the bond. *Pender v. Felts*, 2 S. & M. 535. After the return term, even if the bond be void, the court will not entertain a motion to quash it. *Clow v. Tharpe*, 3 S. & M. 64. Yet it is never too late, for one not a party to a bond, when sought to be charged as such, to object to its

operating to charge him, even though the bond be forfeited; he may show at any time, and in any collateral proceeding that the bond was not obligatory on him; as where one partner has signed the partnership name to a bond, the other partner may always impeach the judgment, and show it to be void as to him. *Smith v. Tupper*, 4 S. & M. 261. Yet, it seems, if the original judgment be absolutely void, either for want of jurisdiction in the court rendering it, over the subject-matter, or over the parties, the forthcoming bond, and the judgment rendered on its forfeiture, are both absolutely void also; and the court, although if the bond were merely erroneous, it could not do so, may, where the bond and the judgment are thus void, quash the bond at any time, either at, or subsequent to the return term; as where a judgment is taken by default final against a garnishee, without a judgment *nisi* being rendered, and such garnishee gives a forthcoming bond, the original judgment being void, so, also, will the bond be. *Buckingham v. Bailey*, 4 S. & M. 538. But if the judgment quashing the bond be void, and an execution afterward issue on the original judgment, and be levied on property of the defendant therein, who at the time acquiesced therein, but afterward prosecuted a writ of error therefrom, the defendant's acquiescence will not cure the void judgment of quashal, and the bond will still be in full force. *Bell v. Tombigbee Railroad Co.* 4 S. & M. 549. If, on a writ of error *coram nobis*, a motion be made to quash after the return term, and the motion be considered merely as a mode of bringing up the merits of the case, under the

writ of error *coram nobis*, and not as an independent motion to quash the bond, and the bond be *absolutely* void, the court might, perhaps, set it aside as a nullity. *Parkinson v. Waldron*, 7 S. & M. 189; *Merrett v. Vance*, 6 How. 498; *Miller v. Patton*, 3 S. & M. 463.

14. See *Surety*, 10-12; for rights of surety on forthcoming bond.

15. A forthcoming bond, delivered with the penalty and amount of the execution, in blank, is void; and the maker may plead it in the court below, by *non est factum*, and have an issue to test its validity before the jury; and, in such case, the return of the sheriff, that the forthcoming bond was taken and forfeited, will not preclude the defendant from denying its validity; nor can the plaintiff prove, by parol, an authority in the sheriff to fill up the blank; such authority could only be conferred by writing. *Williams v. Crutcher*, 5 How. 71; *Dickson v. Hama*, Freem. Ch. 284.

16. Where the original judgment is reversed, a forthcoming bond given on it will be void, and a formal motion need not be made to quash it. *Hoy v. Couch*, 5 How. 188.

17. Where the original judgment was in favor of the president, directors and company of the Bank of the United States; and the *fi. fa.* on this judgment, the forthcoming bond given on it, and the execution on that bond, recited a judgment in favor of the "Branch Bank of the United States, at Natchez;" held, that the execution on the bond, conforming to the judgment on the bond, was sufficient. *Bank of the United States v. Patton*, 5 How. 200.

18. A writ of error will lie from a judgment of the court refusing to quash a forthcoming bond. *Ib.* Or quashing one. *Puckett v. Graves*, 6 S. & M. 384.

19. The defendants, in a forthcoming bond, cannot object to the bond, that its penalty is less than double the amount of the execution; the error complained of by a party must be to his prejudice. *Jones v. The Mississippi and Alabama Railroad Co.* 5 How. 407.

20. It is not necessary that there should be any return on the forthcoming bond itself; it will be sufficient, if the execution be returned, that the bond was taken and forfeited. *Ib.*; *Barker v. Planters Bank*, 5 How. 566.

21. It is not a valid objection to a forthcoming bond, that there are not ten days stated in the condition of the bond, between the levy and the sale on the forfeiture of the bond; if the defendant be injured, by too short a time being allowed, he has his action against the sheriff; the plaintiff in execution should not suffer. *Ib.*

22. The defendant in execution, upon whose property the execution is levied, may, where there are several defendants, give a forthcoming bond, with sureties, without his co-defendants in the original judgment joining therein. *Head v. Beaty*, 5 How. 480.

23. It is not necessary that the forthcoming bond should recite the judgment on which it is based; it is sufficient if it recite the execution. *Barker v. Planters Bank*, 5 How. 566.

24. The forfeiture of the bond becomes, by operation of law, a judgment, and no record of it, or judgment in court is necessary. *Ib.*

25. A forthcoming bond, signed by one surety, and delivered to the principal, as an escrow, until another surety signs, is void, unless the other surety sign it. *Sessions v. Jones*, 6 How. 123.

26. Although a forthcoming bond is no part of the record, unless made so by bill of exceptions; yet, if from the motion to quash, and judgment of the court thereon, quashing a forthcoming bond, the error of the court in so doing appear, the judgment will be reversed, though the bond be not in the record; it will, therefore, be an erroneous judgment, which will be reversed, without the bond being of record, that recites that the judge below quashed a forthcoming bond, because it did not appear by the return of the sheriff on the bond, that the bond was forfeited. *Shields v. Graves*, 6 How. 262. So, also, if it appear that the bond was quashed, at a subsequent term, to its return term, the judgment will be reversed, though the bond is not embodied in the record. *Puckett v. Graves*, 6 S. & M. 384.

27. A defective return, or no return at all of the sheriff, will not justify the quashal of a good forthcoming bond; it can only be quashed for some inherent defect. *Ib.*

28. A forthcoming bond taken by the sheriff, without security, or with a fictitious security, is a fraud upon the plaintiff, and is absolutely void, and does not affect the lien of the original judgment. *Carleton v. Osgood*, 6 How. 285. Yet, if received by the plaintiff in execution, it is a good bond; no one else can object to its validity. *Walker v. McDowell*, 4 S. & M. 118.

See *Bills of Exchange and Promissory Notes*, 94. Maker hav-

ing given bond, does not bar writ of error of indorser,

29. Where property of the principal, in a forthcoming bond, is levied on, the surety cannot move to quash the execution. *Kerningham v. Scanland*, 6 How. 540.

30. A motion to quash a forthcoming bond, should set forth the grounds of the motion. *Huston v. Hayter*, 6 How. 580.

31. Whether executors can give a forthcoming bond, on a levy on their testator's property? *Quære?* It would seem that they can; and if such a bond be given, and no objection made to it after the return term, it seems an execution can issue on it, against the executors, to be levied of the goods of the testator, and against the sureties in their own right. *Jones v. Stanton*, 7 How. 601.

32. A forfeiture of a forthcoming bond, renders it a joint judgment against all the obligors, and a separate execution against one, omitting the others, cannot be sustained. *Conn v. Pender*, 1 S. & M. 386.

33. It is error to quash a forthcoming bond, as to the principal, and leave it in force, as to the surety. *Ib.*

34. See *Judgment*, 96. Where no execution on bond has issued for a year, it must be revived by *scire facias*.

35. See *Judgment*, 103. Execution may issue against an obligor, in the bond, though his co-obligors have prosecuted a separate writ of error, and a judgment of affirmance rendered against them.

36. The omission to insert, in the condition of a forthcoming bond, the words "said property" after the word "deliver," will not vitiate the bond; they will be supplied by intendment. *Clow v. Tharpe*, 3 S.

& M. 64; *Robinson v. Parker*, 3 S. & M. 114.

37. See *Partner*, 19. One partner cannot give a forthcoming bond, which will bind his co-partner.

38. Whether a forthcoming bond, taken by the sheriff of one county, requiring the property levied on to be delivered at the court-house of another county, can be the foundation of a statutory judgment on a bond? *Query?* *Buckingham v. Bailey*, 4 S. & M. 538.

39. Where a motion to quash a forthcoming bond is taken by the circuit judge, under advisement, and his decision is not rendered in four months, as required by the statute, the motion will be considered as having expired with the term. *Puckett v. Graves*, 6 S. & M. 384.

40. See *Bills of Exchange and Promissory Notes*, 194. Where maker of a note gives bond, it does not satisfy a separate judgment on the same note, against the indorser.

41. A forthcoming bond, for the delivery of "one lot of dry goods," and made payable to the plaintiffs by their co-partnership name, is not void, but at most, only erroneous and voidable. *Parkinson v. Waldron*, 7 S. & M. 189.

42. The obligation of a surety on a forthcoming bond is not that he will pay the money, but that the property levied on shall be forthcoming; if therefore there has been no levy, or the property levied on is not subject to the execution, or the levy is a fictitious one and the property alleged to be levied on, has no existence, the bond will be without consideration as to the sureties. *Long v. United States Bank*, Freem. Ch. 375.

43. Where a motion was made in the circuit court to quash a

forthcoming bond for irregularities, which was overruled, the parties cannot afterwards be heard in equity to allege that the bond was void because signed in blank; they ought to have made that defence on the motion to quash. *Ib.*

44. A forthcoming bond, if illegally quashed, will give the judgment creditor no right to resort to the original judgment; yet a court of equity is not the proper tribunal to obtain relief, if a resort to that judgment be attempted; the court in which the judgment was obtained is the one to apply to, for relief. *Thomas v. Tappan*, Freem. Ch. 472.

45. An order of a circuit court quashing a forthcoming bond at a term subsequent to the return term of the bond, is a mere nullity. *Bingaman v. Hyatt*, 1 S. & M. Ch. 437.

46. The execution of a statutory forthcoming bond does not discharge the levy of the execution under which it is taken; that levy continues in full force until the bond is forfeited and acquires the force and effect of a judgment. *Ib.*

47. An irregular forthcoming bond incapable of forfeiture, being taken, does not discharge the levy of the execution, and upon the quashal of such a bond the original levy remains in full force. *Ib.*

48. A forthcoming bond for the delivery of property taken in execution signed in blank and afterwards filled up by the sheriff, without authority, is void, and a court of chancery will decree such bond to be cancelled. *Patterson v. Denton*, 1 S. & M. Ch. 592.

FRANCHISE.

1. The legislature granted to N. a right to establish and keep a

bridge for toll over a certain river; in a suit by B. to recover of T. damages for the erection by T. of a rival bridge over the same river within the limits allowed N. by the legislature, it will not be necessary for B. to prove a grant of the bridge from N.; mere possession and the reception of the tolls by B. will be sufficient to enable him to maintain an action for the disturbance of his franchise. *Townsend v. Blewett*, 5 How. 503.

2. The legal existence of a franchise attached to a particular place and the ownership of that place established by deed to the possessor of the place, from the grantee of the franchise and possession under the deed from such grantee, are sufficient evidence of title to the franchise to enable such possessor to sue in case for damages for a disturbance of it. *Ib.*

3. Where a toll bridge was authorized by law, it was held, that a free bridge could not without authority be erected so as to interfere with the granted franchise; and where such free bridge was erected and a suit brought for disturbance thereby of the franchise, it was held competent to prove how many persons at different times had crossed the rival bridge in order to show the damage. *Ib.*

4. See *Turnpike*, 1 & 2; it seems that a franchise may be assigned, and the assignee may sue for and recover in his own name the tolls allowed by the grant of the franchise.

5. See *Railroad*, 5; whether the road may be sold under execution.

6. See *Railroad*, 7; a franchise not assignable by a banking company to which a railroad is affixed by its charter.

FRAUD AND FRAUDULENT CONVEYANCE, AND STATUTE OF FRAUDS.

1. See *Contract*, 3, as to how far suppression of knowledge affecting price of commodity sold, will vitiate contract of sale. *Frazer v. Gervais*, Walk. 72.

2. As to fraud in contract, see *Evidence*, 7, 8, and 9. *Kerr v. Calvit*, Walk. 115.

3. See *Chancery*, 115, 116, as to rescission of contract for fraud in grantee, in attempting to pervert deed of fraudulent grantor. *Dis-mukes v. Terry*, Walk. 197.

4. See *Sheriff's Sale*, 1. Continued possession of vendor of personal property not fraudulent, if bought at sheriff's sale. *Hoggatt v. Hunt*, Walk. 216.

5. See *Chancery*, 36, as to what is sufficient averment to set aside voluntary deed as fraudulent.

6. An insolvent debtor may prefer some creditors to others. *Mer-rick v. Henderson*, Walk. 485.

7. See *Chancery*, 123, as to jurisdiction of chancery for fraud in patentee of United States in procuring patent.

8. See *Chancery*, 84, as to where the fraud of assignor of property to pay debts, in inserting debts in the schedule not agreed to be paid, will release assignee from his agreement to pay them.

9. The possession by donor, of personal property, is not fraudulent, where the parties owe no debts, and there is no intention to commit fraud. *Fisher v. Allen*, 2 How. 611.

10. Where town lots were represented by the advertisement of sale to be situated at the head of navigation, contrary to the fact; but the vendee was familiar with their situation,

and with the country, *held*, that the misrepresentation was not fraudulent as to him, and he could not avail himself of it as a bar to the recovery of the purchase-money. *Anderson v. Burnett*, 5 How. 165; *Bell v. Henderson*, 6 How. 311.

11. Fraud vitiates everything; even a judgment obtained by fraud will be set aside. *Niles v. Anderson*, 5 How. 365; *Hurd v. Smith*, *Ib.* 562; *Ross v. Lane*, 3 S. & M. 695. See *Chickasaw*, 3, for a case where a fraudulent vendee of the seeming legal title was postponed to the holder of an equitable title, where the fraud of the vendee of the legal title prevented the vendee of the equitable title from perfecting that equity.

12. See *Chancery*, 85; fraud without consequent damage does not vitiate contract.

13. Where the vendor retains possession of personal property, after the sale, it is *prima facie* evidence of fraud, and throws the *onus probandi* of proving the fairness of the sale on the vendee. *Carter v. Graves*, 6 How. 9.

14. See *Trust*, &c. 14, 15, where deed of trust fraudulent as to subsequent creditors.

15. It is competent for a sub-vendee, when sued by the first vendor, on a note given for the property by such sub-vendee, to his immediate vendor, and which the latter transferred to the first vendor, in payment of his indebtedness for the same property, to set up in defence of the note the fraud practised in the sale of the property by the first vendor, and to make the same defence that the first vendee could have made. *Barringer v. Nesbit*, 1 S. & M. 22.

16. See *Vendor and Vendee*,

11-17; for what fraud will entitle vendee to rescission of a contract.

17. An assignee of a note takes the place of the assignor, and if the latter has been guilty of fraud the former is equally affected by it. *Barringer v. Nesbit*, 1 S. & M. 22.

18. A proprietor of land issued stock in a town which he intended to lay off upon his grounds, used artifices to decoy purchasers, induced some to lend their names, under a promise never to call on them to pay, and succeeded in selling some stock, but afterward abandoned the scheme, and declared his intention not to collect any debts contracted for the stock; *held*, that the facts constituted a fraud on the part of the plaintiff, and he could not recover on the note. *Ib.*

19. See *New Trial*, 42; when granted for fraud in procurement of judgment.

20. See *Evidence*, 146; to transfer a note with nothing due on it, and concealing that fact, is a fraud on the vendee.

21. Fraud may be established at law, and may occasion either the partial or total failure of consideration of a note; it is competent, therefore, for a defendant, sued as the maker of a note given for a lot in a town, to prove false representations made by the trustees of the town, to induce the sale, and also that the lot had become of no value, in consequence of the failure of the plaintiff to make promised improvements. *Brewer v. Harris*, 2 S. & M. 84. And a plea in bar, averring that the lot had been purchased on the condition that certain representations of the vendor should be complied with; that those representations were false, and had not

been complied with, and so the consideration had failed, would not be multifarious, but a good plea. *Elis. v. Martin*, 2 S. & M. 187.

22. Facts tending to establish fraud and failure of consideration, or either, may be proved under general issue, where the action is on a note, or for a sum certain; perhaps *aliter*, if upon a *quantum meruit*, or generally, for unliquidated damages. *Ib.*

23. B., while suit was pending against him, bought a piece of land from his infant brother, for a high price, gave his note, payable immediately, for it, and executed a deed of trust to C. upon the land, and nearly all his other property, to secure the payment of the note, and in the deed included the crops of cotton to be grown, with power to sell at ten days' notice; *held*, to be a fraudulent deed as to creditors, and void. *Reed v. Carl*, 3 S. & M. 74.

24. See *Personal Property*, 10. Possession for three years vests title as to creditors, though the vendee held by conditional sale, if the bill of sale be not recorded.

25. In the year 1823, E. F., being in debt, sold his slaves at public sale to F. who, as consideration, agreed to pay some of E. F.'s debts, and left the slaves in E. F.'s possession; F. afterward sold the slaves to J. F., the father of E. F., on condition J. F. would pay him the debt he had paid for E. F.; whereupon J. F. still left the slaves with E. F., who retained possession of them until 1840; *held*, that this long possession by E. F. established a *prima facie* case of fraud against J. F. when claiming the slaves against an execution creditor of E. F. *Rankin v. Holloway*, 3 S. & M. 614.

See *Executor and Administrator*, 221; a private act of the legislature may be declared void if procured by fraud.

26. Testimony sufficient to satisfy the minds of the jurors, is all that is requisite to establish fraud. *Rice v. Dignowitty*, 4 S. & M. 57.

27. The statute of frauds in this state differs from the statute of Charles II. in containing the word *promise* as well as the word *agreement*; it is not necessary, therefore, under that statute, that the *consideration* of the promise should be in writing; therefore a guaranty in these words: "*I will guaranty the payment of the above*," is binding. *Wren v. Pearce*, 4 S. & M. 91.

28. A deed of trust, void on its face, may be declared invalid in a court of law. *Harney v. Pack*, 4 S. & M. 229.

29. W. being guardian of B.'s child, and executor of B.'s will, and also executor of G. W., and guardian of his children, executed bonds to the probate court, with J. W. and P. as his sureties, in large penalties, for the faithful discharge of his duties; and long afterward, to indemnify his sureties, conveyed to C., by deed of trust, his land and negroes, all his household and kitchen furniture, his horses, mules, farming utensils, and crops of cotton to be afterwards raised, with a reservation to himself of possession of the property until a sale was necessary to indemnify his sureties; *held*, that the deed was not void on its face; but the circumstances cited were strong badges of fraud. *Ib.*

30. A deed of trust made by the grantor, with intent to hinder, delay, and defraud his creditors, even though neither the trustee nor *cestui*

que trust participated in the design, will be void or valid, according to the circumstances; if made to secure an antecedent debt, with a fraudulent intent by the grantor, it may be void, though neither the trustee nor *cestui que trust* participated therein, and though the fraud of the grantor be not disclosed upon the face of the deed; the question, whether or no it is fraudulent in fact, should be submitted to a jury, and, if found fraudulent, the law condemns the deed as fully as if found fraudulent on its face. *Ib.* So also with a voluntary conveyance of personal property; and if the jury have found it fraudulent, it will not be disturbed on light grounds. *Bogard v. Gardley*, 4 S. & M. 302.

31. The possession by the grantor, in a deed of trust, of personal property conveyed by the deed, will not be fraudulent where the deed authorizes the grantor to retain possession until default of payment of the notes secured by the deed is made; possession by the grantor after that period, may be *prima facie* evidence of fraud, but is not fraud *per se*. *Ib.* The rule that possession after sale is evidence of fraud, is confined to absolute sales, has no application to deeds of trust, or mortgages; the record of the mortgage being equivalent to delivery. *Hundley v. Buckner*, 6 S. & M. 70.

32. A voluntary conveyance from a parent, largely indebted at the time, of slaves to his child, is void as to prior creditors. *Ib.*

33. See *Bills of Exchange and Promissory Notes*, 180-182. A note not void for duress, may be void for fraud in its procurement, and the pleadings should be allowed to be amended to show the fraud.

34. Fraud may sometimes be established by strong circumstantial evidence, even against positive proof, denying it. *Petrie v. Wright*, 6 S. & M. 647.

35. A voluntary release of securities held by a corporation, is void as to creditors, yet if, in the settlement of mutual and conflicting claims, a corporation allow a creditor more than he was strictly entitled to, that is not of itself a fraud; there must be some device to injure others, or the act must be so grossly extravagant and wasteful, as to amount to fraud in law. *Ib.*

36. A sale of his property, by one greatly in debt, and whose every means were more than demanded to meet his immediate pressing wants, on a credit of nine, ten, and eleven years, is made with *intention to hinder, delay, and defraud creditors*. *Pope v. Andrews*, 1 S. & M. Ch. 135.

37. If a vendor make a fraudulent sale of his property, to avoid the payment of his debts, to a vendee, ignorant of the fraud of the vendor, the vendee will be protected, as a purchaser for a valuable consideration. *Ib.*

38. Fraud may be inferred from facts and circumstances; such as the nature of the contract, and the relation and circumstances of the parties. A vendee of land was held to be privy to the fraud of the vendor. 1. Because he was the brother of the vendor, and lived in the same neighborhood, and sometimes together. 2. Because the vendor, at the time of sale, was embarrassed by debts, and that embarrassment known to the vendee; and the vendor had declared his intention not to pay the debts embarrassing him, which declara-

tion, from their relation, the vendee was presumed to have known. 3. The sale was upon a credit of eleven years, and the vendee knew the effect would be to divest the vendor of all his property, and thereby hinder, delay, and defraud creditors, in the collection of their debts. *Ib.*

39. Fraud vitiates judicial acts, and renders them utterly void. *Fletcher v. Rapp*, 1 S. & M. Ch. 374.

40. A fraudulent representation of title in the vendor, will entitle the vendee to a rescission of the contract; and, on a bill filed by the vendee for that purpose, the vendor must show his evidence of title. *Wilkinson v. Davis*, Freem. Ch. 53.

41. See *Vendor and Vendee*, 44. What circumstances take a case out of the statute of frauds.

42. Where the vendee of land who had contracted with the agent of the vendor, and had executed his notes therefor, and knew that the agent had transferred the notes to secure his own debt, without the knowledge of the principal, went to the principal, and agreed to pay him two hundred dollars on these notes, if he would make him a deed to the land, and on the objection of the principal, that the notes were not in his possession, but his agent's, the vendee not disclosing the fact of their transfer by the agent, said he would bear the loss if the agent did not credit the notes with the sum, and the vendor received the sum and made the deed, and the vendee paid the residue of the notes after judgment at law had been obtained by the agent's assignee; *held*, that the vendee was not bound to disclose his knowledge of the transfer of the notes to the

vendor; that though he procured the deed by fraud, yet the vendor could have no relief against him, because he was bound in law to make the deed; and therefore the fraud had worked him no damage. *Young v. Bumpass*, Freem. Ch. 241.

43. See *Chancery*, 305; part payment will not take case out of statute of frauds.

44. Where a debtor made a fraudulent conveyance of his property to his son, and the son afterwards mortgaged a portion of the property thus conveyed, to creditors of his father; and subsequently to the mortgage a judgment was rendered against the fraudulent grantor, who sought to have the mortgage given by the fraudulent grantee set aside; *held*, that being made to secure a *bona fide* debt of the grantor, the mortgage would prevail over the judgment; though the grantor did not join therein. *Agricultural Bank v. Dorsey*, Freem. Ch. 338.

45. A *bona fide* purchaser from a fraudulent grantee, for valuable consideration, and without notice of the fraud, is protected against the general creditors of the grantor; whether a mortgagee from the fraudulent grantee would receive the same protection, *quære?* *Ib.*

46. See *Judgment*, 141; what failure to sue out execution is fraudulent as to *bona fide* purchasers.

47. See *Parent and Child*; a deed from father to son void as to creditors, under circumstances.

48. Fraud is a conclusion of law from facts and intentions, and, although its existence is denied, if the admitted facts conduce to prove it, they must be held to outweigh the denial. *Dick v. Grissom*, Freem. Ch. 428.

49. If a purchaser at a sale under

a deed of trust; by fraudulent management or misrepresentation, prevent the attendance of others, or use influence to deter bidding, a court of equity would set the sale aside; but that such a sale was made when money was scarce, and not more than from twelve to twenty persons present, is no reason for setting the sale aside. *Newman v. Meek*, Freem. Ch. 441.

50. See *Sheriff's Sale*, 60; when sale under, is void for inadequacy of price, and fraud of purchaser. As a general rule there must be an answer to a charge of fraud; where fraud is charged as a conclusion of law, from a particular state of facts set out, it is believed the reason of the application of the rule fails. *Ross v. Duncan*, Freem. Ch. 587.

See *supra*, *Chancery*, tit. *Fraud*.

FREE NEGROES.

1. See *Slaves*, 1-4; how far the law favors freedom, and the right of slaves inhabiting the Northwest Territory, under the ordinance of congress, of 1787, to be free.

2. See *Slaves*, 16. Slave taken to Ohio, manumitted there, and brought back to this state, is still a slave.

3. See *Slaves*, 18; *Will*, 19-23, how far slaves may be manumitted by will.

4. See *Slaves*, 33, 34, for mode of asserting freedom.

5. See *Distribution*, 7. Slave made free by act of legislature, entitled to distribution out of his father's estate, under another act of legislature.

G.

GAMING CONSIDERATION.

Note void for gaming consideration, see *Chancery*, 118; and court of chancery even after judgment may decree it so.

GAMING.

1. See *Criminal Law*, tit. *Indictment*, 92; for indictment under statute against gaming.

2. See *Criminal Law*, tit. *Gene-*

ral Principles, 63; for liability of landlord for his tenants' violation of the law.

GARNISHMENT.

1. How far rights of assignee of note affected by garnishment of maker, see *Bills of Exchange and Promissory Notes*, 14.

2. Where a note is indorsed to a third person and the maker is afterwards garnisheed as a supposed

debtor of the payee, a payment to the garnishing creditor by the maker will be in his own wrong, even though when garnisheed he had no notice of the transfer of his note; the assignment of the note vests in the assignee an absolute right to its proceeds which cannot be diverted by any garnishment process; and if at any time even after judgment and execution at the suit of the garnisheeing creditor, he obtain notice of the assignment, he will be liable to the assignee; and in such case the maker, who stands in the light of a trustee, should file a bill of interpleader. *Oldham v. Ledbetter*, 1 How. 43; but, see *Yarborough v. Thompson*, 3 S. & M. 291, in such case a bill of interpleader will not lie, the garnishee must defend at law. See *Attachment*, 6.

3. The act of the legislature which requires the attaching creditor to give a bond to restore the attached property or its value if the debt attached for be disproved, is intended for the benefit of the party whose effects are attached, and extends to a garnishee who is a trustee for both parties and is bound to see that such bond is given before he pays any effects or debts; and if he do not, the payment or satisfaction by the garnishee is in his own wrong. *Ib.*

4. A sale of attached goods which by law are transferred to the plaintiff is made not to divert the title, but to ascertain the value. *Ib.* See *Attachment*, 6.

5. See *Attachment*, 9-13; for judgment against garnishee; and how far void when attachment is void; and the duty of the garnishee to see that the proceedings are regular.

6. Where a maker of a note is sued by an indorser, and he wishes

to plead a payment as garnishee of the payee, the plea must aver that he answered on oath, admitted his indebtedness on the particular note in suit and no other, that judgment was had against him thereon and he had paid the debt; and if he omit to plead these facts and his plea be insufficient, yet if the plaintiff reply to it and an issue is made and a judgment rendered against the maker of the note in favor of the assignee, it will not be set aside by the high court to give the maker an opportunity of pleading his defence more fully. *Reed v. Cage*, 4 How. 253.

7. Where partners are summoned as garnishees, and one answers admitting the indebtedness, it will authorize a judgment against all. *Anderson v. Wanzer*, 5 How. 587.

8. If the debt garnisheed be not due, it is not necessary that the order for the stay of execution should be made part of the judgment; the law stays it and if it issue before the debt is due, it may be quashed. *Ib.*

9. Where the truth of the answer of a garnishee is contested, and an issue made up under the statute to try it; the answer of the garnishee is not evidence on the trial of the issue. *Lasley v. Sisloff*, 7 How. 157.

10. On the trial of such issue, the question is, What does the garnishee owe? the original judgment against the defendant whose debtor is garnisheed need not be read. *Ib.*

11. Where a garnishee answered that he had in his hands a certain sum in notes of a bank, belonging to the defendant, which he offered to bring into court or pay as directed, he will, his answer being uncontroverted, be entitled to

his discharge on bringing the notes into court; and on failure to do that, he will be liable for the value of the notes when received by him which must be ascertained before a judgment can be rendered against him. It will be error to enter a judgment against him for the full amount of the notes on his answer. *Jennings v. Summers*, 7 How. 453.

12. The garnishee is entitled to satisfaction for his attendance. *Ib.*

13. Where a garnishee in answer to summons states that he had been indebted to the defendant in execution, but prior to the garnishment had, at the instance of the defendant assumed to pay the debt to another person, no fraud appearing, the garnishee should be discharged. *Swisher v. Fitch*, 1 S. & M. 541.

14. Judgment debtors may be garnisheed and judgment rendered against them in favor of the attaching creditor. *Gray v. Henby*, 1 S. & M. 598.

15. It is no objection to the writ of garnishment that the judgment debtor may be subjected to two executions; he has his remedy. *Ib.*

16. Where the plaintiff in an execution having garnisheed a third party, as indebted to the defendant, waives his right to an issue before a jury to inquire into the facts of the case, the answer of the garnishee must be taken to be true. *Swisher v. Fitch*, 1 S. & M. 541.

17. See *Attachment*, 13; judgment against garnishee on an attachment without bond is void.

18. Where a garnishee suffers two judgments to go against him, one by the attaching creditor and one by the holder of the note to whom it has been assigned, he can have no relief in equity. He must

in his answer to the garnisheeing creditor set up his defence that the note was assigned. *Yarborough v. Thompson*, 3 S. & M. 291; and upon his answer setting up that he had received notice of the assignment of the notes made by him anterior to the service of the garnishment it is error for the court to render judgment against the garnishee without further evidence. *Thompson v. Shelby*, 3 S. & M. 296.

19. Where the answer of the garnishee gives a narrative of some pecuniary transactions between himself and the defendant without discovering any indebtedness to the defendant, and it not appearing by the record that the truth of the answer was questioned, a final judgment against the garnishee will be erroneous; it should be a judgment *nisi*. *Frost v. Patrick*, 3 S. & M. 783.

20. Where a garnishee summons issued before the writ of attachment was sued out, and a judgment final was taken against the garnishee, without a judgment *nisi* as a foundation, it will be absolutely void. *Buckingham v. Bailey*, 4 S. & M. 538.

21. Where a garnishment issues on a judgment at law on the suggestion that the defendant in the judgment has not visible property to pay it, and judgment is rendered against the garnishee who takes the case by writ of error to the high court, errors in the original judgment cannot be inquired into; *aliter*, however, if the judgment be void. *Whitehead v. Henderson*, 4 S. & M. 704.

22. Where a garnishee fails to answer, a judgment *nisi* must first be taken against him, before a *scire facias* can issue. *Ib.*

23. See *Banks*, 39, 40; delin-

quent stockholders when garnisheed at law must pay in specie ; notwithstanding acts of 1840 and 1842.

24. Courts acting under the same system of local jurisprudence should, where their organization and mode of procedure admit of it, make their judgments equally comprehensive ; where, therefore, by statute a judgment creditor who has run his execution without effect, can by garnishment at law bring in the debtors of his judgment debtor and divert their debts to the satisfaction of his own, a court of equity will, by analogy to the proceedings at law under similar circumstances, adopt a similar course. *Wright v. Shelton*, 1 S. & M. Ch. 399.

25. A., a debtor by note of B., was garnisheed by C., who was a judgment creditor of B. ; A. answered, admitting the indebtedness, and judgment was rendered against him ; D., as assignee of B., afterwards sued A. on the note and recovered a judgment by default ; *held*, that D., as assignee, had a right to collect the note, and A.'s omission to defend at law precluded him from setting up, after judgment, the former recovery against him as garnishee. *Speight v. Brock*, Freem. Ch. 389.

GIFT.

1. Where A., residing in Tennessee, placed certain slaves in the possession of his son-in-law, who was insolvent, and resided in the same state with his father-in-law, and at the same time declared that it was as a loan only, that he delivered the slaves to his son-in-law, against whom there were then judgments, and the slaves remained in the possession of the son-in-law in

Tennessee for more than five years, and by the laws of that state five years' quiet possession vests title to personal property ; it was *held*, that the facts did not amount to a gift of the slaves to the son-in-law, he having always acknowledged the paramount title of his father-in-law, nor did the five years' possession of the son-in-law vest title in him ; that possession not being adverse ; and where the son-in-law brought such slaves into this state, they would not be subject to judgment against him until after the expiration of three years from their introduction, and the failure of the father-in-law to make a record of the loan. *Moseby v. Williams*, 5 How. 520.

2. In a controversy between the creditors of N. and his mother, about the ownership of slaves levied on in the possession of N., in whose possession they had been placed by his mother, it was *held*, that by placing the negroes in possession of her son, the law presumed she intended to make a gift of them to her son, and it is incumbent on her to show that a loan only was intended, in order to rebut the legal presumption, and where the jury have found the possession was under a gift, their verdict will not be lightly disturbed. *Falconer v. Holland*, 5 S. & M. 689.

3. In the absence of positive proof of a loan, the following circumstances held sufficient to uphold the verdict of a jury that it was a gift, to wit : 1. the delivery of the negroes by the mother to the son in Mississippi in 1837 ; the removal of mother and son to Tennessee ; soon after, the re-removal of the son alone to Mississippi with the negroes and keeping them till levied on for his debts in 1841, without

paying hire, or any agreement to pay hire; 2. the possession of the son being held without any promise on his part to redeliver, or limitation as to the length of his possession; 3. The silence of the mother in her will as to any disposition of these slaves, though her other property was disposed of; 4. A direction by the mother to the son to sell two of the slaves thus delivered, to pay a debt of his upon which she was surety; 5. The failure to make out and put of record some instrument of writing, stating the nature of the title by which the son held; 6. The failure to produce such an instrument, when one was alleged to have been made. *Ib.*

4. It is the policy of the law in this state, to construe all possession of property to be under the ownership of the party possessing it; and where a controversy arises between creditors of the possessor and the alleged owner, as to whether the possession is under a gift or a loan, and the evidence is conflicting, and there is no positive documentary evidence of title in the claimant, the presumptions of law operate with all their force to regard the possession as under a gift. *Ib.*

5. As between donor and donee, the gift of a chattel is incomplete without delivery, or some act equivalent to delivery, if at the time the thing given be susceptible of transmission; actual delivery is not necessary; it may be constructive or symbolical; it seems the delivery of a deed, or having it recorded, the declarations of the donor, the situation of the parties, are circumstances which the jury may take into consideration on the question as to whether there was a delivery from the donor to the donee; but unless they are satisfied of that fact

they cannot find that it was a gift. *Carradine v. Collins*, 7 S. & M. 428.

See *Deed of Gift*, *supra*.

GRANT.

1. The use of the word 'reservation,' in a treaty reserving lands to certain persons named in it, is equivalent to a grant in fee simple. *Newman v. Harris*, 4 How. 522; *Niles v. Anderson*, 5 How. 365.

2. Where land was granted to the board of police of a county, and for the use and benefit of the county, for a county site for a court-house, and the board of police entered on the land, built a court-house, laid off town lots and sold them, but subsequently removed the county site and court-house from the land thus granted, to a different and distant place; *held*, that the location of the county site, &c., was a condition subsequent, the non-compliance with which defeated the estate, and the land reverted to the grantor. *Daniel v. Jackoway*, Freem. Ch. 59.

GUARANTY.

1. Where an open letter of credit is given, agreeing to guarantee the payment of any debt contracted by the party within a certain time, with any person in a certain city, it is the duty of the person who credits the party having the letter, to notify the guarantor in a reasonable time, that the guaranty has been accepted, and eighteen months after is not a reasonable time. *Hill v. Calvin*, 4 How. 231.

2. A guaranty in these words, "I will guarantee the payment of

the above," made at the foot of the account of a third person, will be binding; the consideration need not be in writing; a declaration, therefore, averring that the defendant promised the plaintiff he would guarantee the payment of articles furnished his son, and that, relying on this guaranty, the plaintiff furnished the son the articles, and the defendant then and there promised in writing to pay for them, will be good. *Wren v. Pearce*, 4 S. & M. 91.

3. In an action on a guaranty of the payment of the debt of another, it is not necessary to prosecute to insolvency the principal debtor; before the guarantor can be held liable; perhaps *aliter* if a guaranty of solvency merely. *Ib.*

4. A declaration in assumpsit against a guarantor, which avers a non-payment of the debt by the principal debtor, but does not aver a non-payment by the guarantor, is bad as alleging no breach. *Williams v. Staton*, 5 S. & M 347.

5. In an action against a guarantor; the averment of notice to the defendant in these words, "of all which the said defendant had due notice," is a sufficient averment of notice for proof to be made. *Ib.*

6. Whether the guarantor of the debt of another, in the following words: "To Mr. I. W.: if Mr. E. should trade with you for a jack-ass, I will go his security for that amount of money. S," is entitled to notice of the sale before he can be held liable on the guaranty, — *quære?* *Ib.*

7. The guarantor of a promissory note, who assigns it and guarantees its payment, is not entitled to notice of its non-payment; he is liable at all events. *Thrasher v. Ely*, 2 S. & M. 139.

8. See *Bills of Exchange and Promissory Notes*, 178; when person who puts his name on the back of a note is guarantor, and when maker.

GUARDIAN AND WARD.

1. Sale by parent, of child's lands, void, unless authorized by proper tribunal. *Griffing v. Hopkins*; Walk. 49.

2. Guardian's expenditure for ward is regulated by the probate court, which may permit him to exceed the income of the ward and order a sale of property to meet the excess; but the guardian cannot do so except by authority of the court; he must account with his ward and not the ward with him. *Moore v. Cason*, 1 How. 53.

3. A guardian can only make a final settlement after due notice by advertisement as provided for by statute; which notice binds all persons interested in the account, and renders them parties to the settlement. *Ib.*

4. An order of the probate court made in term time, that a guardian had presented his final settlement, and ordering the same for record, is not a decree of the court unless made upon the required notice, which must appear affirmatively, to render the settlement valid; in like manner, an account between guardian and ward, indorsed in vacation, "examined, audited and allowed," is not a decree of the court; and neither such order nor account can be given in evidence against the ward to charge him with any alleged balance as due by it. *Ib.*

5. A mere stranger, without showing any interest, cannot move in the probate court for the revoca-

tion of letters of guardianship. *Cotton v. Goodson*, 1 How. 295.

6. See *Executor and Administrator*, 25, as to how far in the same suit the same person can be held liable as executor and guardian, for neglect and waste in both capacities.

7. By statute in this state an infant ward, on her marriage, is entitled to receive her estate from her guardian. *Wood v. Henderson*, 2 How. 893.

8. It seems, that on a writ of *habeas corpus* by a guardian to regain possession of his ward, who has been forcibly taken from him by the parent, the children will not be considered as "restrained of their liberty," if with their mother, though against the consent of their testamentary guardian. *Foster v. Alston*, 6 How. 406.

9. Where wards, females of the ages of nine and ten, were forcibly taken from the testamentary guardian's possession by the mother, and the children expressed a preference to remain with the mother, the court, on a proceeding by *habeas corpus* at the instance of the guardian to recover possession of the children, refused to restore the ward to the guardian's possession, although it appeared that the guardian had taken faithful care of the children, and was in every way competent to discharge his duties. *Ib.* (This case reversed the decision of Chancellor Buckner, Freem. Ch. 732; and the Chief Justice, Sharkey, dissented.)

10. The probate court has no jurisdiction over guardians appointed by other states. *Bell v. Suddeth*, 2 S. & M. 532.

11. A guardian is not chargeable with interest for money in his hands unless he has consented to take the

money at interest, or unless it has been loaned out at interest under the direction of the court. *Hendricks v. Huddleston*, 5 S. & M. 422.

12. After the term of the court has elapsed at which a guardian's final account has been allowed, it cannot be opened again for examination in the probate court. *Ib.*

13. A guardian cannot erect buildings on the property of his ward, even under the authority of the court, so as to subject the land to the payment of the cost of the building; or which will involve the necessity of selling the land for that purpose; where, therefore, a guardian under the authority of the probate court, had a building erected on the lands of his ward, and the mechanics who erected it filed their petition in the circuit court to subject the land to the cost of the building under the mechanics' lien law, *held*, that the petition could not be maintained and must be dismissed. *Payne v. Stone*, 7 S. & M. 367.

14. See *Trusts*, §c. 24-26; purchase by guardian of his ward's property voidable at choice of ward, and what will constitute ratification of the sale.

15. D., in the year 1815, offered to take charge of V., a motherless infant, and raise and educate her at her own expense, and did so until the year 1830, when she took out letters of guardianship over V. and her property, and in her report, as guardian, to the probate court, in 1832, stated that she had kept no account against V., and from friendship for her mother had been induced to raise and educate her; *held*, that under these circumstances there was no foundation either in law or fact for any charge in fa-

vor of D. against V. prior to the year 1830. *Davis v. Roberts*, 1 S. & M. Ch. 543.

16. Where a guardian expends more money upon his ward than the income of his ward's estate, without authority from the proper

tribunal, he does it at his peril ; and having so done, he has no claim to have the principal property sold to reimburse him in such excess, much less a right to retain the property for that purpose. *Ib.*

H.

HABEAS CORPUS.

1. See *Slaves*, 7, 27, 32 ; as to writ of, when detained from owner. *Scudder v. Seals*, Walk. 154.

2. A circuit judge has not jurisdiction of a writ of *habeas corpus* to try the right of a negro held in bondage, to his freedom. *Thornton v. Demoss*, 5 S. & M. 609.

HEIRS.

1. Heirs of a donee, under act of congress of 1803, conferring donations of land, cannot where donee has died and the claim been confirmed in them, deny the widow of donee's right of dower in the land, or their ancestor's title. See *Title*, 1, 2. *Hackler v. Cabel*, Walk. 91.

2. The half-brother of an intestate, where there are neither wife, child, nor brother of the whole blood, will inherit. Revised code, 41, § 50. *Fathereè v. Fathereè*, Walk. 311.

3. The statute of descents of this state provides that property shall descend among collaterals ac-

cording to the rules of the civil law. J. H. died possessed of real estate, (which he acquired from his father,) without descendants or father or mother ; the brothers and sisters of his mother shall take in preference to a son of an uncle of his father ; notwithstanding the estate was derived through the father. *Hickey v. Gilbert*, 1 How. 32.

4. See *Scire Facias*, 4 ; as to duty to revive judgment against heirs ; and see *Executors and Administrators*, 58, 59 ; as to heir's right to realty, on death of ancestor.

5. See *Evidence*, 71 ; the transcript from the records of the probate court of another state, not evidence of heirship.

6. See *Limitations Statute of*, 15, 17 ; where right of co-heir, barred by.

7. See *Executors and Administrators*, 40, 43 ; judgment against administrator, no evidence against heir for want of privity ; there is no privity between the real and personal representatives of a deceased person ; the administrator takes the personalty ; the heir the

realty; and the court will not decree a sale of realty to pay a debt barred by the statute of limitations.

8. Persons born out of wedlock are not included in our statutes of descent which speak of children, unless their parents subsequently intermarry, in which event the statute legitimizes them. *Porter v. Porter*, 7 How. 106.

9. See *Execution*, 54; a *scire facias* cannot issue against heir on judgment against executor.

10. See *Executor and Administrator*, 220, 223; the heir is not deprived of his right to the realty by an illegal sale by the administrator, but may recover the land against a *bona fide* purchaser for value.

11. See *Infant*, 1. Infants *in esse*, to be heirs, from conception.

12. Where the heirs have divided the realty of their ancestor, and a controversy arises between the creditors of one of them, and the heir touching the property, a decision in that case will not affect the rights of the creditors of the ancestor. *Baynton v. Finnall*, 4 S. & M. 193.

13. The words "lawful heirs," and "her heirs forever" in a deed, are words of limitation of the estate to the donee, and not words of purchase for the heirs. *Warren v. Haley*, 1 S. & M. Ch. 647.

HIGH COURT OF ERRORS AND APPEALS.

1. Where defendant to suit in this court, dies, if a non-resident, the suit may be revived by publication against his representatives. *Dis- makes v. Terry*, Walk. 180.

2. See *Writ of Error*, 6; jurisdiction, 10; for jurisdiction.

3. The high court will presume the action of the court below correct, until the contrary is made to appear by the record. *Leach v. Lebuzan*, 2 How. 908; *Henderson v. Guyot*, 6 S. & M. 209; *Green v. Creighton*, 7 S. & M. 197; but if error is in the record, unless it appear affirmatively that it was waived, the high court will reverse the judgment. *Ross v. Mims*, 7 S. & M. 121.

4. The high court of errors and appeals has no jurisdiction of a writ of error to a judgment after forthcoming bond given and forfeited. *Stamps v. Newton*, 3 How. 34; *Sanders v. McDowell*, 4 How. 9.

5. See *Practice*, 29, and *Bills of Exceptions*, 19, for practice in.

6. Where an objection to a deed was not made in the court below, it cannot be made in this court. *Randolph v. Doss*, 3 How. 205; *Pussel v. Knowles*, 4 How. 90.

7. Where a proper judgment has not been rendered below in awarding the writ of possession in ejectment, this court will direct a proper writ without disturbing the verdict. *Bledsoe v. Little*, 4 How. 13.

8. This court can take no notice of a suggestion made to it, that a defendant below, died before the judgment below was rendered. *Dean v. The State*, 2 S. & M. 200.

9. See *Trial of Right of Property*, 9; when high court will enter proper judgment.

10. See *Judgment*, 102; for practice in the issuance of execution on affirmed judgment.

11. The high court is not precluded, by the decisions of its pre-

decessors, but will decide according to its own convictions of the law. *Garland v. Rowan*, 2 S. & M. 617. Its decisions, however broad the expressions may be, must be construed with reference to the facts of the case. *Bell v. Tombigbee Railroad Company*, 4 S. & M. 549.

12. This court will not take notice of objections to the admissibility of evidence on the trial below, when the objection was not made below. *Neely v. Planters Bank*, 4 S. & M. 113.

13. A fictitious case, to test a right to do a particular thing, will not be entertained by the high court of errors and appeals. Where, therefore, a record purporting to be an appeal from the circuit court was filed, presenting the question of the right of the tax-assessor to assess the capital stock of the bank, a party to the appeal, and it appeared by the admission of the attorney of the bank, and the certificate of the auditor of the state, that no tax had been levied on the capital stock of the bank, it was held to be a fictitious case, and that the court could not decide the question. *Bank of Port Gibson v. Dickson*, 4 S. & M. 689.

14. The high court has the right, after the term at which a cause has been decided, to grant a rehearing; and in a case of peculiar hardship, where irremediable injury might otherwise be done, a rehearing will be granted. *Roberts v. Edmondson*, 4 S. & M. 730.

15. Objections not made in the court below, lose their weight when made in the high court. *Sessions v. Reynolds*, 7 S. & M. 730.

16. Where the record does not purport to set out all the testimony, this court will presume that

all written evidence spread out in the record, was properly proved in the court below to render it competent testimony. *Doe ex dem. Caillaret v. Bernard*, 7 S. & M. 319.

17. This court can act only from the record; and see *Jurisdiction*, 10; as to power to entertain case sent from circuit court on doubts. *Carraway v. Board of Police of Yazoo County*, 1 How. 21.

HOTCH-POT.

The advancement which the statute of distributions requires the child of an intestate to bring into hotch-pot with the whole estate, if they desire to come into partition with the other distributees, must have been received from the intestate himself in his lifetime by way of advancement; therefore, slaves settled on the child of the father's first marriage, by a deed made by the second wife, before her marriage with the father, but in view of it, need not be brought into hotch-pot by such daughter. *Callender v. McCreary*, 4 How. 356.

HUSBAND AND WIFE.

1. See *Assault and Battery*, 4; as to power of husband to chastise wife. *Bradley v. State*, Walk. 156.

2. See *Tenant in Common*, 2. Slaves limited by deed, chose in action, and not reduced to possession, do not survive to husband.

3. Married woman's deed is a nullity. *Herrington v. Herrington*, Walk. 322.

4. A divorce, *a mensa et thoro*, will be decreed for continued ill

treatment; and adultery may be set up as a bar to alimony. *Holmes v. Holmes*, Walk. 474.

5. A mortgage executed by husband and wife, resident in this state, according to our forms of conveyance upon lands situate here, is binding, and the wife cannot set up a marriage contract in Louisiana, by which they agreed that the property acquired should be governed by the laws of that state. *Lapice v. Gereadeau*, Walk. 480.

6. Where, in a marriage contract, it was provided that "the husband was not to have access to the wife's property; that is to say, it was not to be taken in execution for his debts, and he was not to bargain or sell it; and the wife was to have the use of it during her life, and then dispose of it as she saw proper;" held, on the death of the wife, without disposition of the property, it being personal, the husband was entitled to it. *Kimball v. Kimball*, 1 How. 532.

7. The terms of a marriage contract is the expositor of the intention of the parties. *Ib.*

8. The possession of husband, as administrator, will entitle him, in his own right, to the interest of the wife, in the *choses in action* and personal estate of the estate he is administering on, and a sale by him will pass such interest. *Cable v. Martin*, 1 How. 558. And he may sue in his own name for property obtained during coverture. *Magruder v. Stewart*, 4 How. 204.

9. See *Chickasaws*, 2; as to right of wife to dispose of separate property; when allowed by the laws of tribe to do so.

10. A marriage contract in these words, "W. & C. have agreed to marry, and it is their desires to enjoy their property together until

death, and then each of us to dispose of our property as we may think best," is not a jointure, nor a bar to the widow's dower. *Whitehead v. Middleton*, 2 How. 692.

11. A *feme covert* cannot bring a suit alone against her husband; she must proceed by *prochein ami*; yet if she sue alone, and the husband do not demur, but answers the bill, even though in his answer he reserves the right to demur, it will be too late to make the objection. *Kenley v. Kenley*, 2 How. 751.

12. To justify the wife in leaving the bed and board of her husband on account of cruel treatment, there must be a reasonable apprehension of bodily harm. Mere austerity of temper, petulance of manner, rudeness of language, a want of civil attention, occasional sallies of passion, if they do not threaten bodily harm, do not amount to that cruelty against which the law can relieve; and courts of equity will not decree a separate maintenance to the wife, unless there be a reasonable apprehension of bodily harm from the husband. *Ib.* If a separate provision be granted the wife on account of the cruel treatment of her husband, it will be discontinued if he offer *bona fide* to cohabit with her and treat her kindly for the future. *Ib.*

13. Where no trustee is named in a marriage contract, the husband is, by operation of law, constituted the trustee, and as such is entitled to the possession of the trust property, and will not be removed unless he abuse the trust. *Ib.*

14. See *Contract*, 23; when administrator of husband can sue wife for money of husband retained by her.

15. The husband can sue for and

recover, *at law*, a negro which he has conveyed to his wife by direct bill of sale, upon an agreement to live separate; and that too though the slave was the property of the wife prior to the marriage, and a divorce has subsequently been granted; if the wife have any remedy it would be in equity. *Tourney v. Sinclair*, 3 How. 324.

16. The confessions of a husband of his adultery, made under circumstances which exclude the idea of collusion, are evidence against him of the adultery. *Tewksbury v. Tewksbury*, 4 How. 109.

17. Where the husband had nothing when he married, and has acquired nothing since his marriage, and a decree for divorce is rendered against him for adultery, a court of chancery having, by the adultery, control of the person and property of the husband, may decree that all the property which the wife had on her intermarriage, or has acquired since, shall be delivered to her to hold as her separate property. *Ib.*

18. By the law of Louisiana, the husband can sell neither the *paraphernal* nor *dotal* property of his wife; and if he do, the sale will confer no title; where therefore a second husband sold a slave, the property of the succession of the first husband's estate, the sale was declared void. *McMurren v. Soria*, 4 How. 154.

19. Where the husband, in right of his wife, is in possession of her life estate in lands on which a crop of cotton is planted, and the wife die before it is gathered, the husband or his representatives will be entitled to the crop when gathered. *Hall v. Browder*, 4 How. 224.

20. A stipulation in a marriage contract, that the husband should

have the income and profits of the land and slaves of the wife, will entitle him to the emblements of land held by the tenure of the wife's life, where she dies before the crop is gathered. *Ib.*

21. The husband is entitled to a vested legacy of the wife, although not reduced into possession during coverture, and the purchaser of the same from the husband in the wife's lifetime will acquire a good title; an assignment by the husband, during the lifetime of his wife, of her *choses in action*, being valid. *Lowry v. Houston*, 3 How. 394. See also *Wade v. Grimes*, 7 How. 425; *Scott v. James*, 3 How. 307.

22. It seems that the husband is the next of kin to his wife, by relation of marriage, and takes her property, as such, in case of her death; but whether so considered or not, her personal property, remaining after death, goes to her husband, either *jure mariti* or as next of kin. *Ib.*

23. The husband acquires an absolute right to the property of the wife obtained during her coverture, and he may sue for it in his own name without joining his wife. It is only necessary to join husband and wife in a suit for wife's property, where the right would survive to the wife. *Magruder v. Stewart*, 4 How. 204; *Wade v. Grimes*, 7 How. 425.

24. Where a woman was married three times, and was entitled to certain property as one of the distributees of her first husband's estate, and there was no division or partition of the property during her coverture with the second husband, and no assignment or sale of it by him, nor any other act evincing an assertion of title by him, the rights of the wife will stand,

after the death of the second husband, in the same situation as at the time of their marriage; and, on her third marriage, they will pass, at her death, to her third husband, as her survivor. *Wade v. Grimes*, 7 How. 425; *Harper v. Archer*, 4 S. & M. 99. Otherwise, however, if the second husband had reduced the property to possession. *Scott v. James*, 3 How. 307.

25. The rights of the wife to her personalty are at an end when the property is reduced to possession by the husband during coverture; the title thereby becomes absolute in him. *Killcrease v. Killcrease*, 7 How. 311; but if the right accrue after coverture, it is absolute in the husband, without reduction to possession. *Magruder v. Stewart*, 4 How. 204; *Wade v. Grimes*, 7 How. 425; and if he survive the wife, the right, in any case, survives to him, though never reduced to possession. *Lowry v. Huston*, 3 How. 394; *Scott v. James*, 3 How. 307; *Wade v. Grimes*, 7 How. 425.

26. A married woman stood by, and suffered, without objection, certain slaves, owned by her as her separate property, to be valued for her husband, and in his presence, with a view to his taking stock in a bank upon a mortgage of the slaves; held, that her conduct was not such as would divest her of her property. *Palmer v. Cross*, 1 S. & M. 48. And it is questionable whether she can be deprived of it in any other mode than the one prescribed by the instrument of settlement. *Id.*

27. A private sale, by an administrator who has intermarried with the widow of his intestate, of property belonging to the estate, passes

only the right of the wife, and does not affect the rights of the distributees. *Bainys v. McGee*, 1 S. & M. 208.

28. See *Deed*, 26, 27; how far marriage contracts are within the registration laws.

29. In a grant of property to a married woman, the words, "in her own right, would not, by the common law, convey a separate estate in the property to the wife, but would operate as a conveyance to the husband; the statute of 1839, which allows married women to become seized and possessed of real or personal property in her own name and as of her own property," would so far alter the rule of the common law as to secure the property conveyed to a married woman, "*in her own right*," to her; but it would not secure the rents and profits of the property, and other property purchased with such rents and profits; they would belong to the husband and be liable to his creditors; the act of 1839 being designed only to save the specific property for the wife. *Grand Gulf Bank v. Barnes*, 2 S. & M. 165; *Beatty v. Smith*, 2 S. & M. 567. And that act does not alter the husband's right to the usufruct of the wife's real estate; and a lease of her land by him before and since that statute will be good, and his creditors will be entitled to the proceeds of the lease. *Baynton v. Finnal*, 4 S. & M. 193.

30. See *Evidence*, 237; husband incompetent witness for wife, on trial of right of property.

31. Where a wife's distributive share in her father's estate accrues after her marriage, it enures to the husband alone, and he can sue for it without joining his wife; therefore, where G., prior to the act for

the preservation of the rights of married women, married F., who was the daughter of D. F., who died after her marriage, and G. applied to the probate court, in his own name, for his wife's distributive share in her father's estate; and G.'s wife filed a counter petition, claiming the distributive fund in her own right, and averring the insolvency of her husband; *held*, that G. was entitled to the fund, in his own right, to the exclusion of his wife, *McGee v. Ford*, 5 S. & M. 769; and her death, therefore, before the money is paid over to the husband, will not affect his right; and if the husband sue alone for his wife's distributive portion, and the probate court secure it to him, and it does not affirmatively appear that the wife's right accrued before coverture, the decree will be upheld. *Henderson v. Guyot*, 6 S. & M. 209.

32. See *Dower*, 26; a marriage to a second, during the life of a first wife, who has never been divorced, is absolutely null, and though the parties live together for twenty-five years, as man and wife, the widow will not be endowed of his land.

33. It was settled, at common law, that the contract of a married woman was void; and the act of 1839, familiarly known as the "woman's law," does not extend her power of contracting, or of binding herself or her property; its effect is to take away from her all power to subject her property to the payment of her contracts, except in the particular mode specified in the statute, by deed, acknowledged separate and apart from the husband. *Davis v. Foy*, 7 S. & M. 64. The general rule, at common law, is, that a *feme co-*

vert, having a separate estate, acts with regard to it as a *feme sola*; but that rule is changed by the act of 1839 of this state, which provides that the slaves owned by a *feme covert*, under the provisions of that act, might be sold by the joint deed of the husband and wife, executed, proved and recorded, agreeably to the laws then in force, in regard to the conveyance of the real estate of a *feme covert*, and *not otherwise*; since the act of 1839, therefore, a *feme covert* cannot convey or incumber her separate slaves, or charge them in any manner in any other mode than that pointed out in the statute; they cannot therefore be subjected to the joint note of the husband and wife, though given for articles necessary for the plantation of the wife and housekeeping purposes. *Frost v. Doyle*, 7 S. & M. 68. Nor can such slaves be subjected to the satisfaction of a judgment rendered on a forthcoming bond, against a married woman who executed the bond jointly with her husband, as sureties for a third party. *Berry v. Bland*, 7 S. & M. 77. The rule, at common law, would be different; the fact that she had contracted a debt during coverture, either as a principal or as a surety for her husband, or jointly with him, would be *held prima facie* evidence, to charge her separate estate without any proof of a positive agreement or intention so to do. *Ib.*

34. A judgment cannot be rendered, in a court of law, against a married woman, on a promissory note made by her husband and herself; she cannot be sued at law, either before or since the act of 1839. *Davis v. Foy*, 7 S. & M. 64.

35. A deed to a married woman is not void; as to third persons it is

valid, whether she can be compelled to pay the purchase-money or not that concerns the vendor alone; where therefore B. conveyed a lot of ground to J., a married woman, and she and her husband sued H. in ejectment for the lot, *held*, that H. could not object to the validity of J.'s title, because of her coverture. *Harmnn v. James*, 7 S. & M. 111.

36. The marital rights of the husband to the property of his wife cannot be defeated unless an intention be clearly expressed that the property is to be held for the separate use of the wife; nothing is to be implied against him. *Williams v. Clairborne*, 7 S. & M. 488. And also, same case, 1 S. & M. Ch. 355.

37. W. (in debt) and H. (possessed of large property) being about to marry, by deed of settlement before the marriage conveyed to a trustee for H.'s *sole and separate use*, all her property and the interest, income, and proceeds thereof in trust; 1. For the use of W. and H. for *their natural lives*, subject to disposal by H. by will; 2. That H. should have, during her life, full control over the property, and that it should not be subject to W.'s debts or his control; 3. That the trustee might sell when requested; *held*, that W., on the death of H., had no right in the property thus conveyed, or to a participation in the proceeds, income, or profits of it. *Ib.*

38. Where, in one clause of a deed of marriage settlement between W. and H., the property was settled in trust for the use of W. and H. for their natural lives, and W. covenanted in the deed, that the whole property and its proceeds should belong to H. for her sole and separate use; *held*, that he was

estopped by his covenants from setting up any claim to the property on the death of H. *Ib.*

39. Where, upon the bill of the wife against the husband, a decree *a vinculo matrimonii* has been granted, the mere omission in that decree to provide for the alimony of the wife cannot affect the wife's right to such a provision at a subsequent time by a separate and distinct proceeding. *Shotwell v. Shotwell*, 1 S. & M. Ch. 51.

40. A circuit court having decreed a divorce *a vinculo matrimonii*, at the instance of the wife, the superior court of chancery has jurisdiction of a bill by the divorced wife against the husband to have alimony allotted to her; a decree for alimony, *resulting* from the decree for a divorce, but not being identical with it, or a necessary part of it. *Ib.*

41. The husband has no power, without the consent of the wife, to convert her real property into personalty, so as to change the course of descent, or right of succession. *Fletcher v. Wilson*, 1 S. & M. Ch. 376.

42. S., by deed of gift, conveyed to F. certain negroes in these words: "in trust for the use and benefit of my daughter, Ann, and her lawful heirs;" "in trust for the proper use and benefit of the said Ann and her heirs forever;" *held*, that these words conveyed to the daughter an estate for her sole, separate use, and that during her life it was not subject to the debts of the husband. *Warren v. Haley*, 1 S. & M. Ch. 647.

43. Where personal property is conveyed to the wife and her heirs, for her sole and separate use, and she dies, the husband surviving is entitled to the property, *jure mariti*, in preference to her next of kin. *Ib.*

44. Where the husband purchased a tract of land with the money of his wife, derived from her separate estate, the purchase will create a resulting trust in her favor, and the husband will be deemed to convey the land to the wife; and where the husband, by improper and false pretences and repeated importunities, induces the wife to convey a part of her separate estate by deed to his brother, without consideration, and for the husband's own use, and with the fraudulent intention to strip the wife of her property, the brother will be compelled to reconvey the property to the wife. *Pulliam v. Pulliam*, Freem. Ch. 348.

45. Where a husband has abandoned his wife, lives in adultery with another woman, and has fraudulently attempted to cheat her out of her property, a decree of divorce from bed and board will be decreed. *Ib.*

46. A feme covert, claiming a separate estate, cannot sue her husband by her trustee; she must do so by her next friend; but it seems it is doubtful how far the defect can be noticed under a general demurrer. *Hunt v. Booth*, Freem. Ch. 215.

47. L. put H. in possession of certain slaves, to belong to H. on payment of a certain sum; H. failed to pay, and L. conveyed the slaves to T. in trust to secure M., who had advanced the money for H.; in its repayment, and in the payment of an additional sum due by H. to M., with power to T. to sell the slaves if H. failed to pay,

and if he did pay M., then T. was to convey the slaves to H.'s wife for life, with a limitation in favor of her children by name. H. afterwards paid M. the sums of money secured by the slaves: *Held*, in an attempt by the judgment creditors of H. to subject the slaves to his individual debts, contracted prior to the payment of the money by him, that they were liable to the payment thereof. *Ib.*

48. The intention to create a separate estate for the wife must be clearly apparent, in order to exclude the husband from the right to personal property which is given to the wife; the intervention of a trustee has never been held to go the length of vesting a sole and separate estate in the wife; words to that effect must be used. *Ib.*

49. Marriage is a valuable consideration in law; the wife is regarded as a *bona fide* purchaser where there is a marriage settlement; will hold the property settled against creditors whose debts are not liens; where, therefore, a husband, previous to marriage, agreed to settle \$2,000 on his wife, and the agreement was recorded; and after marriage, and while free from debt, he bought two slaves which his wife agreed to take in lieu of the settlement; though no record was made of it, and the husband and wife continued jointly possessed of the slaves; *held*, that they were not subject to the subsequent judgment creditors of the husband. *Armfield v. Armfield*, Freem. Ch. 311.

I.

IMPARLANCE TERM.

1. The granting an imparlance term affects the remedy merely, and therefore applies to suits brought before its passage. *Woods v. Buie*, 5 How. 285.

2. Under the act of 1840, granting the imparlance term, each defendant is entitled, as a matter of right, to a continuance of his cause to the term succeeding that in which he is brought into court; the circuit court has no discretion; and this is the case whether all the defendants in the same suit are served with process at the same term or not; each defendant is entitled to a term, even though the other defendants may have plead at a former term, and it will be error to force a trial of a case at a term to which one of the defendants has been served with process and claims a continuance of the case. *Mauzy v. Commercial Bank of Natchez*, 5 S. & M. 41.

IMPROVEMENTS.

How far improvements made with knowledge of adverse title will be set off against rents, see *Vendor and Vendee*, 36; and *Executor and Administrator*, 145-148.

INADEQUACY OF PRICE.

1. It seems that mere inadequacy of price is not, of itself, suffi-

cient to set aside a sale made at public auction; yet if land sold at public auction for the same price that land usually sold for at public auction, it seems that, though the price brought was greatly less than the supposed worth of it, the sale would not be set aside for inadequacy. *Newman v. Meek*, Freem. Ch. 441.

See *Sheriff's Sale*; when sale under execution is void for inadequacy of price and fraud of purchaser.

2. Mere inadequacy of price, without fraud, is not a sufficient ground for setting aside a sale of land under execution. *Delafield v. Anderson*, 7 S. & M. 630.

INDIAN.

1. See *Criminal Law*, 13; as to indictment for settling on Indian territory.

2. See *Dancing Rabbit Creek Treaty*; for claims of Indians under.

3. See *Chickasaws and Chickasaw Treaty*; for claims of Indians under.

4. See *Evidence*, tit. *Witness*. Indian, competent witness.

INFANTS.

1. An infant is *in esse*, from the time of conception, for the purpose of taxing any estate which is for

his benefit, whether by descent, devise, or under the statute of distribution, provided the infant be born alive, and after such a period of foetal existence, that its continuance in life might be reasonably expected; such right is inchoate, and will not be completed by a premature birth; an infant, born eight months and twenty-one days after the death of his sister, will be a distributee, of her estate. *Harper v. Archer*, 4 S. & M. 99.

2. An infant who has disposed of his personal property, and has done no act, since his coming of age, to confirm the contract, and has pursued his remedy in good time after his minority, is entitled to recover it back; and that, although the property may have passed out of the possession of the infant's vendee into that of a third person, a purchaser for a valuable consideration, without notice; nor does the law, in rescinding the contracts of infants, draw distinctions between contracts executed and executory; where, therefore, A. being an infant, bought of E. a tract of land for \$8000, and gave, in payment, five slaves, and his notes for \$375, and \$1500; and the slaves were afterwards sold to H., under execution, as the property of E.; it was held, that A., on coming of age, might, by bill in equity against E. & H. rescind the contract, and recover the slaves. *Hill v. Anderson*, 5 S. & M. 216.

3. In a suit in chancery, against both adult and infant defendants, a decree rendered in favor of the complainants against all the defendants, upon *pro confesso*, against the adult defendants, and the answer of guardians *ad litem* for the infants, without any proof, will be erroneous, as to the infants, even

though time be reserved in the decree to the infants, after they come of age, to show cause against it; a *pro confesso* against an infant, will not authorize a decree against him; there must be proof; and a reservation of a right to show cause against the decree, after the infant attain majority, does not cure the error; whether such reservation extends only to defects and errors in the decree itself, and is barred by a sale under it? *Quære?* *Hargrove v. Martin*, 6 S. & M. 61. It extends only to errors in the decree; he cannot reinvestigate the subject-matter of the suit, nor can he redeem mortgaged premises which have been sold; nor will a decree against an infant rendered for the sale, instead of a technical foreclosure of mortgaged premises, which gives no day after their coming of age to show cause against it, and rendered, without a guardian *ad litem* for them, or the bill being taken for confessed, will not, for such irregularities, be void. *Smith v. Bradley*, 6 S. & M. 485.

See *Chancery*, tit. *Infants*.

INJUNCTION AND INJUNCTION BOND.

1. Upon issuing an injunction, the clerk must indorse on the writ, "its operation is to be suspended until bond is given," and it will not be operative until a bond be given by the parties. Whether administrators bound to give bond, *quære?* *Davis v. Dixon*, 1 How. 64; yet if the clerk issue the injunction, though no bond be given, the service of the injunction will be obligatory, and be an excuse to a sheriff for not executing a writ against

which the injunction was prayed. *Duckworth v. Millsaps*, 7 S. & M. 308.

2. See *Evidence*, 185; as to how far injunction bond *void* for uncertainty; and how far parol proof admissible to explain its uncertainty.

3. See *Judgment*, 45; an injunction does not take away lien.

4. When the injunction of a judgment at law is dissolved, the plaintiff therein may institute instant proceedings on the injunction bond against all the parties thereto, without the issuance of an execution and its return upon the judgment at law since the dissolution of the injunction; and after such dissolution and action brought on the bond, the issuance of an execution and the giving and forfeiture of a forthcoming bond on the original judgment will not bar the action on the injunction bond. *Harrison v. Balfour*, 5 S. & M. 301.

5. Where a subpoena and injunction are combined in the same writ, it is the duty of the clerk out of whose office the subpoena issues, to indorse upon it that its effect is suspended as to the injunction until the party execute sufficient bond; until the bond is executed the writ has not the efficacy of an injunction; but where an injunction is issued on the fiat of a judge to the clerk, and the fiat requires a preliminary bond, the issuance of the injunction is sufficient evidence to the party on whom it is served that the bond was given, and he must obey it; though it turn out that no bond was given. *Duckworth v. Millsaps*, 7 S. & M. 308.

6. The statute authorizing circuit judges to grant injunctions "within their respective circuits" limits their power to cases which have originated within the districts over which

their jurisdiction extends; and an injunction in a case originating and to operate beyond their districts, granted by a circuit judge, is void. *Montgomery v. Commercial Bank of Rodney*, 1 S. & M. Ch. 632.

INSTRUCTIONS.

1. It is not error to refuse to charge the jury upon a certain point, unless the bill of exceptions shows that the point arose in the case. *Miles v. Myers*, Walk. 379.

2. The court need not give instructions on abstract points of law. *Prim v. Kittridge*, Walk. 390.

3. In an action for a malicious prosecution, where there has been testimony on both sides, and the facts have not been found by the jury, it is error to instruct them "that admitting all the testimony, in favor of the plaintiff, to be true, yet he had not shown a want of probable cause." *Furness v. Porter*, Walk. 442.

4. The court is not bound to charge the jury, unless called upon. *Montgomery v. Griffin*, Walk. 453.

5. An erroneous charge upon an abstract point, which did not arise in the case, no ground for reversal. *Garner v. Collins*, Walk. 518.

6. It is error, under the statute, for the circuit court to charge the jury on points not called for by either party. *Davis v. Tiernan*, 2 How. 786. Yet the law restraining the judge, must receive a liberal construction, and where, therefore, the instructions of the judge were in response to but the reverse of those asked, it will not be error. *Carpew v. Canavan*, 4 How. 370. Or it will not be error, if it be sub-

stantially that which was asked by counsel. *Vick v. Peck*, 4 How. 407. Nor will it be error for the court to qualify the instruction asked, so as to make it conform to the law. *Walker v. McDowell*, 4 S. & M. 118.

7. The court may refuse a charge, partly correct and in part erroneous; it may also refuse a charge not pertinent to the case; and all instructions must be construed, with reference to the facts of each case. *Martin v. King*, 3 How. 125; *O'Reilly v. Hendricks*, 2 S. & M. 388. And instructions perfectly correct in themselves, may be refused, and the refusal will not be ground of error, unless the evidence is embodied in the record, that their applicability and relevancy may be seen. *Loring v. Willis*, 4 How. 383.

8. An instruction on an abstract principle of law, though correct in itself, may be refused, if it be not applicable to the case, or be calculated to mislead the jury. *Newman v. Foster*, 3 How. 383.

9. Where the jury have given a correct verdict, it will not be set aside for erroneous instructions of the court, where instructions correctly given on those points, could not have changed the result. *Hill v. Calvin*, 4 How. 231. So, also, where the verdict is according to the law and evidence, and the case comes up on a refusal to grant a new trial. *Baynton v. Finnall*, 4 S. & M. 193.

10. A refusal to give instructions, the relevancy or application of which, do not appear, is not ground of error. *Kliffield v. The State*, 4 How. 304; *Myers v. Oglesby*, 6 How. 46.

11. Although the court cannot charge the jury, as to the weight

of evidence, yet the court may, when the plaintiff wholly fails to make out his case, instruct the jury to find for the defendant. (See this case for one, where the proof on the part of the plaintiff failed to make out his case.) *Perry v. Clarke*, 5 How. 495.

12. Where the law has been already correctly stated to the jury, on a given point, it will not be error to refuse a charge on the same point, not strictly applicable to the testimony. *Ellis v. Commercial Bank of Natchez*, 7 How. 294.

13. It is not the province of the court to say to the jury, that from certain facts proved, certain presumptions arise; such presumptions are for the jury; yet, if the court do so instruct the jury, but immediately qualify it by adding that the jury must weigh all the testimony, and form their own conclusion, whether such presumptions were true, and that positive proof was not necessary, the verdict will not be disturbed. *Dickson v. Moody*, 2 S. & M. 17.

14. After the jury have retired to consider of their verdict, it is error for the court to instruct them, at their request, without the consent of the parties, on a matter of law. *Taylor v. Manley*, 6 S. & M. 305.

INSURANCE.

1. Where, in a policy of insurance on cotton shipped on a steamboat at Natchez for New Orleans, the cotton was valued at seventy dollars per bale, and in the voyage a portion of the cotton was injured; held, that the criterion of damages which the insurance company would have to pay, would be the proportion which the ascertained amount

of damage on éach bale bore to the value fixed on each bale by the policy ; if, therefore, the loss were ten per cent. on the cotton injured, and the valued price seventy dollars per bale, by paying seven dollars on each bale injured the insurers would discharge themselves. *Natchez Ins. Co. v. Buckner*, 4 How. 63.

2. It is a proper mode of ascertaining the percentage of loss on damaged cotton, insured at a valued price, to have it appraised by cotton brokers, qualified to judge of its value, who will declare the *rate* of depreciation, which, with the cost of saving the cotton by the assured, will constitute his damages ; as, if cotton were valued at seventy dollars a bale, and the rate of depreciation were thirty per cent. on the intrinsic value of the cotton, that sum, with the ascertained cost of saving the cotton, will be what the assured will be entitled to. *Ib.*

3. The insurers are not bound, where the insured articles are valued, to pay on a partial loss the difference between what the damaged goods will sell for at auction, and the agreed value ; the *ratio* the injury bears to the sound article, is the criterion of damage ; and if the assured, in case of partial injury, sell the insured goods when they arrive at the port of destination, the expenses of the sale will fall on the assured. *Ib.*

4. In case of a valued policy on a loss by injury to the vessel, the charges for which the insurers are liable, are those extraordinary ones which happen in consequence of the wreck ; all the ordinary charges incident to the transportation are, in such a policy, supposed to be covered by the valuation ; it would be otherwise if the policy were an open one. *Ib.*

5. Where it was the custom, on an injury having happened to insured cotton, to have the cotton thus injured appraised, to ascertain whether its damage exceeded ten per cent., and after that appraisement to sell the damaged cotton at public auction, and that the price it brought at such sale furnished the true criterion for ascertaining the damage done and the value of the damaged article, it was held competent, in an action on a policy to recover damages for injury to insured cotton, to prove the custom, the appraisement under it, the sale at auction of the damaged article, and the value of the sound article at the port of arrival, with the view of ascertaining the amount of loss the insurers would be liable for. *Stanton v. Natchez Ins. Co.* 5 How. 745.

6. In marine policies of insurance, which apply also to the navigation of rivers, the assured impliedly warrants seaworthiness, proper documentation, not to deviate, and that the goods shall be properly stored ; all of which, except proper documentation, extend to the owner of the goods ; any voluntary deviation, therefore, from the contract of insurance, even though the risk be not increased thereby, discharges the underwriters ; therefore a steamboat, goods on which were insured against the perils of the river, of fire, and all other perils, losses, and misfortunes that might happen in the navigation from port to port, took a brig in tow ; *held* that the taking a brig in tow was a deviation from the policy, and discharged the underwriters as to the cargo ; the officers and crew of the boat being, prior to the loss, agents of the assured after abandonment of the insurers. *Natchez Ins. Co. v. Stanton*, 2 S. & M. 340.

7. The principle that the underwriters are liable for a loss, the proximate cause of which is one of the enumerated risks, though the remote cause may be traced to the masters and mariners, has never been extended to a case of voluntary deviation. *Ib.*

8. It seems that the insurers are not liable for any loss for which the owners of the ship are answerable to the shippers. *Ib.*

9. Barratry is an offence which can only be committed against the owners of the vessel, and is not covered by the ordinary provisions of a policy. *Ib.*

10. An advertisement that an insurance company would insure goods upon certain enumerated boats, is at most but a waiver of the implied warranty of seaworthiness. *Ib.*

11. The usages of the insurance offices of New Orleans, La., cannot affect the insurance offices of Natchez, Miss.; nor will an alleged usage of towing boats on the Mississippi river by steamboats, unless shown to be so general and so well known that it was fair to presume the parties contracted with reference to it, affect the liability of insurers. *Ib.*

INTEREST.

1. Interest may be allowed by the jury, on an open account, though there be no proof that interest was agreed to be paid by the defendant. *Wiltburger v. Randolph*, Walk. 20.

2. English rule of interest, at four per cent. per annum, computed on legacies charged on personal property, at one year from testator's

death, adopted. *Brownlee v. Steel*, Walk. 179.

3. A note promising, to pay a specified sum, being "for money loaned at forty per cent. until paid," is a contract for a loan of money, at that rate of interest, and must be enforced under the constitution of the state, which, prior to 1821, permitted such contracts. *Loury v. Loury*, Walk. 207.

4. By law, in this state, judgments in 1806, bear no interest; and statutes regulating interest, should bear no retrospective effect. *Eastin v. Vandorn*, Walk. 214.

5. Where the circuit court has jurisdiction of sums exceeding fifty dollars, if the plaintiff declare on a note of that amount *exactly*, he must also declare for interest. *Thomas v. Miller*, Walk. 324.

6. Where the rate of interest is specified in a foreign decree, on which decree the action is based, it need not be proved by other evidence. *Whitaker v. Comfort*, Walk. 421.

7. On a judgment, by default, founded on a note made in the district of Columbia, a writ of inquiry is necessary to ascertain the rate and amount of interest. *Fretwell v. Dinsmore*, Walk. 484.

8. See *Contract*, 17; as to when specific damages or interest only recoverable.

9. See *Bills of Exchange and Promissory Notes*, 23. Interest incident to debt, and clerk will calculate it on judgment, by default on note.

10. See *Bills of Exchange and Promissory Notes*, 31; as to interest on damages for protest.

11. See *Practice*, 27. When error in calculation of interest will be noticed by high court.

12. A note executed in Missis-

issippi, and payable in Louisiana, with ten per cent. interest, in the absence of all proof of the legal interest of Louisiana, will not be usurious. *Martin v. Martin*, 1 S. & M. 176. A contract is governed by the law of the place, where it is to be performed; and where a note is payable in a different state, the rate of interest in that state must be proven, as a fact, to the court, where none is expressed on the face of the note. *Swett v. Dodge*, 4 S. & M. 667. And where the

record does not show what the rate of interest of the foreign state is, the verdict of the jury will be presumed to be correct, though it exceed the legal rate of interest of this state. *Henry v. Halsey*, 5 S. & M. 573.

13. A note, payable in the district of Columbia, on the Maryland side thereof, will bear the rate of interest of the law regulating that portion of the district, which rate not being judicially known to the court, must be proved. *Ib.*

J.

JACKSON, CITY OF.

The claimants of lots in the city of Jackson, under the law of 1822, granting preference on certain terms, one of which was, that the commissioners on the part of the state should designate such lots as were to be preferred, must show that the lots to which they set up their claim were so designated. *Bingaman v. Phillips*, 1 How. 285.

JEOFAILS, STATUTE OF.

1. In an action on a contract to deliver nine hundred bales of cotton, on demand, the omission to state in the declaration the consideration of the contract, is a fatal one, not cured by verdict. *Minor v. Michie*, Walk. 24.

2. An issue and verdict cure all

defects in pleading, where the issue necessarily involves the proof of the facts omitted to be set forth in the pleadings; so that the omission to state the date of the promise, and the value of the articles sued for, after plea and verdict, will be cured. *Delahuff v. Reed*, Walk. 74.

3. See *Ejectment*, 1, 2. How far statute of, cures defective demise, when laid from heir in life of ancestor. *Winn v. Cole*, Walk. 119.

4. Mistake in form of action of trespass, for trespass on case, not cured by statute of jeofails. *McFarland v. Smith*, Walk. 172.

5. Defects in declaration cured by judgment by default. *Irwin v. Williams*, Walk. 314.

6. Verdict cures omission to insert the amount of damage in the declaration, and cures defective averments; but not where a total

want of title appears. *Poindexter v. Turner*, Walk. 349.

7. A verdict and judgment cure all defects which might have been taken advantage of by demurrer. *Whitaker v. Comfort*, Walk. 421.

8. Where a bad replication is filed, and issue taken on it, and verdict and judgment, the defect will be cured by the verdict. *Keithley v. Borum*, 2 How. 683.

9. See *Assumpsit*, 7; error of assumpsit on sealed instrument, cured by verdict.

10. Misjoinder of issue, or a verdict on an immaterial issue, will be cured by the verdict. *Chichester v. Daggett*, 2 How. 863.

11. The statute of jeofails cures a failure to join in an issue of *non assumpsit*, by adding the *similiter*. *Smith v. Warren*, 2 How. 895. And where, in an action on a note against an indorser, the declaration failed to allege due demand and notice, or alleged demand and notice on a day subsequent to the maturity of the note, and a judgment by default was rendered, the defect is cured by the statute of jeofails. *Winn v. Levy*, 2 How. 902; *Wells v. Woodley*, 5 How. 484.

12. Where the plaintiff, in an action on a bond described himself as both assignee and payee of the bond, and judgment by default was taken thereon, the error will be cured by the statute. *Ragsdale v. Caldwell*, 2 How. 930.

13. See *Bills of Exchange and Promissory Notes*, 37; defect in allegation of protest at sight cured by statute.

14. A replication in these words, "issue to second plea," with the name of the plaintiff's counsel to them; though bad on demurrer, will be cured by the statute. *Pickett v. Ford*, 4 How. 246.

15. The statute of jeofails, after a judgment by default, cures a variance between the indorsement on the writ and the amount demanded in the declaration. *Shrock v. Bowden*, 4 How. 426.

16. So also where the declaration averred the note to be payable at a time anterior to its date. *Ib.*

17. See *Verdict*, 9. Cures issue on negative pregnant.

18. Where, in an action on a money-bond, by an assignee, the declaration did not aver a non-payment of the money to the payee; *held*, that the defect was cured by the statute. *Clarke v. Gregory*, 5 How. 363.

19. The statute of jeofails will not cure a failure to decide upon a demurrer to a plea in the cause, even though there has been a verdict on another plea. *Marlow v. Hamer*, 6 How. 189.

20. A defect in a replication, in these words, "replication in short, by consent," is cured by verdict. *Halsey v. Pinckard*, 6 How. 278.

21. Where an action of assumpsit is brought, instead of on the case specially, and no objection is taken to it till after verdict, the defect is cured. *Cartwright v. Carpenter*, 7 How. 328; *Kellogg v. Budlong*, *Ib.* 340. So if it be an action of assumpsit, when it ought to be debt. *Bone v. McGinley*, *Ib.* 671.

22. See *Scire Facias*, 10; a discontinuance cured by verdict, of parties to a *sci. fa.* to revive judgment.

23. After judgment, on inquiry of damages in attachment, the fact that attachment was for unliquidated damages, and the declaration in trover, will be cured by the statute. *Redus v. Wofford*, 4 S. & M. 579.

24. Where the declaration fails to make out a case against the defendant, and he, instead of demurring, pleads to the action, and a verdict and judgment are given against him, it seems that, under the statute, the defect in the pleadings will be cured, and the judgment be undisturbed; but *aliter*, if the evidence be embodied in the record, on the overruling a motion for a new trial. *Reaves v. Dennis*, 6 S. & M. 89.

25. Where a writing obligatory, made by two, is sued upon, but only one of the obligors is sued, and he files two pleas; 1. Payment by one obligor. 2. Payment by the other obligor; and a simple replication is filed to both pleas, professing to answer both, on which issue was taken, and a verdict rendered for the plaintiff, *held*, that the misleading was cured by the verdict, the defendant should have demurred. *Barrow v. Wade*, 7 S. & M. 49.

26. A failure to join in issue by a *similiter*, is cured by verdict. *Harmon v. James*, 7 S. & M. 111.

JOINT TENANTS.

Under a joint conveyance the possession of one will be deemed the possession of both, unless there is proof of an ouster. *James v. Rowan*, 6 S. & M. 393.

JUDGMENT.

1. A duly authenticated transcript of a judgment obtained in another state, against a citizen of this, upon proceedings by attachment, without the service of pro-

cess upon the defendant, is not evidence in an action of debt on such judgment against the defendant therein, in the courts of this state. *Chew v. Randolph*, Walk. 1.

2. Judgments against deceased persons are nullities. *Gerault v. Anderson*, Walk. 30.

3. After plea of payment, judgment by default is erroneous. *Selser v. Wilkinson*, Walk. 108; so also, if there be any plea filed. *Dickson v. Hoff*, 3 How. 165; and if a plea in the record, plaintiff must show by the record it was not there when judgment was taken. *Irving v. Montgomery*, 3 How. 191; *Purvis v. Forbes*, 5 How. 518.

4. A judgment of the court, where there has been no plea filed or judgment by default taken, is erroneous. *Spain v. Winter*, Walk. 152.

5. Forthcoming bond is satisfaction of original judgment. *Stewart v. Fuqua*, Walk. 175. *Connell v. Lewis*. *Ib.* 251.

6. Upon a judgment revived by *scire facias*, the execution should issue on the original judgment. *Eastin v. Vandorn*, Walk. 214.

7. A verdict without judgment, will not sustain the plea of former recovery. *Butler v. Stephens*, Walk. 219.

8. On sustaining demurrer to plea, the judgment should be *respondeat ouster*. *Douglass v. Hendricks*, Walk. 230; *Southward v. McLaughlin*, *Ib.* 325.

9. Payment to the clerk of the court, is no satisfaction of the execution or judgment. *Lewis v. Johnson*, Walk. 260.

10. Judgment at law, how far bar to relief in equity. See *Chancery*, 21, 23, 35.

11. Judgment by default cures

defects in declaration. *Irwin v. Williams*, Walk. 314.

12. Judgment by default against indorser of a note is final without the intervention of a jury. *Owen v. Little*, Walk. 326.

13. Where two judgments, whether by default or otherwise, were rendered on the same day, preference will be given to the one first entered on the minutes. *Biggam v. Merritt*, Walk. 430; *Smith v. Ship*, 1 How. 234. Where money is levied on executions, that which issues on the oldest judgment will be entitled to it. *Grand Gulf Bank v. Henderson*, 5 How. 292; *Carleton v. Osgood*, 6 How. 285. See *infra*, 45.

14. An attorney at law, cannot assign judgment without express authority from the plaintiff. *Head v. Gervais*, Walk. 431.

15. On a judgment by default on an award for a specific sum, no writ of inquiry is requisite. Rev. Code, 120, § 97; *Chace v. East*, Walk. 439.

16. See *Execution*, 11; as to whether injunction-destroys lien of judgment.

17. The act of 1824, p. 105, § 12, makes all judgments liens on the property of the defendant from the time of entering them; the first judgment entered will have the first lien; and where three are entered on the same day, and nothing to show which were entered first, they will all be of the same date. *Burney v. Boyett*, 1 How. 39; *Smith v. Ship*, *Ib.* 234; *Grand Gulf Bank v. Henderson*, 5 How. 292; *Andrews v. Wilkes*, 6 How. 554.

18. Whether the court will inquire into the fractions of a day to ascertain priority of judgment. *Quære?* It will not look to the

minutes of the judge, which are no part of the record, to ascertain priority. *Ib.*

19. Where the judgments are of the same date, the one whose execution was levied first on the property of the defendant, will have the right to prior satisfaction out of that property; such levy being to the extent of the value of the property a satisfaction of the judgment. *Ib.*

20. See *Evidence*, 30; as to how far judgment, evidence, except between parties and privies.

21. In actions in form *ex contractu*, against more than one defendant, the verdict and judgment must be against all or none. *Jones v. McGahey*, 1 How. 128.

22. The judgment of every court of competent jurisdiction is holden to be correct, unless the error appear on the record. *Byrd v. The State*, 1 How. 163.

23. On judgment by default on note, the clerk will calculate interest. See *Bills of Exchange and Promissory Notes*, 22.

24. A *scire facias* to revive a judgment is in the nature of an action, and should show the reputation and character of the parties sought to be charged, and the mode by which that character devolved on them. *Pickett v. Pickett*, 1 How. 267.

25. A joint judgment bad as to one, will be bad as to all. *Pittman v. Planters Bank*, 1 How. 527.

26. See *Attachment*, 9, 12; for judgment in; and how far void for uncertainty.

27. See *Assumpsit*, 6; when judgment greater than damages laid.

28. See *Comity*, 3; how far barred by discharge under insolvent law of another state.

29. See *Limitations, Statute of*, 10 ; for limitation of judgment.

30. *Nil debet* bad plea to action of debt on a judgment. *Williams v. Guignard*, 2 How. 722.

31. See *Bills of Exchange and Promissory Notes*, 29 ; for effect of judgment by default, on right of parties.

32. Where the action is debt, and the judgment is in damages, it will be a mere clerical error, and not ground to reverse. *Smith v. Nolen*, 2 How. 735 ; *Downs v. Ladd*, 4 How. 40 ; but see *contra*, *Wilkinson v. Patterson*, 6 How. 193.

33. Judgment by default will be set aside by this court, notwithstanding refusal of inferior court to do so, and upon affidavit of merits and payment of costs, when the application was made before an opportunity for trial had been lost. *Porter v. Johnson*, 2 How. 736.

34. A memorandum in the record in these words, "motion to quash forthcoming bond, by the defendant in this case and the execution issued thereon ; motion sustained ; forthcoming bond, and execution issued thereon quashed, the bond being irregularly taken," is too uncertain to constitute a judgment of the court, and will not be evidence in a suit against the sheriff who took the bond, for having taken a void bond. *Gridley v. Denny*, 2 How. 820.

35. Judgments are evidence only between parties and privies. *Ib.*

36. A judgment by default final, on a declaration on a note, and containing the common counts, there being no bill of particulars, is not erroneous even though there be no discontinuance as to the common counts. *Gridley v. Briggs*,

2 How. 830 ; *Lillard v. Planters Bank*, 3 How. 78 ; or if a plea of *non assumpsit* be filed to the common counts. *Rankin v. Sanders*, 6 How. 52.

37. Where a judgment has been rendered in a court of law, in an action of trover for property claimed under a marriage contract, and in the suit at law the contract has received a construction ; a court of equity will not take jurisdiction of a suit between the same parties, about the same property claimed under the same marriage articles. *Hooke v. Wood*, 2 How. 867.

38. Unless there be a judgment by default first taken, a writ of inquiry cannot be executed. *Nobles v. Christmas*, 2 How. 885.

39. Where no execution has issued on a judgment on a forthcoming bond, for more than a year and a day after the forfeiture, it will be irregular to issue an execution without a revival by *scire facias*, and the execution will be quashed on motion. *Reeves v. Burnham*, 3 How. 25.

40. It is irregular to take a judgment by default, unless the return of the sheriff on the writ, shows that the process was executed within the prescribed time before court ; the statute makes it the duty of the sheriff to indorse on the writ where he received and where he executed it ; and if he fail to do so, no presumption will be indulged in favor of it. *Calhoun v. Matlock*, 3 How. 70.

41. Where the judgment of the inferior court is for a greater sum than that demanded by the suit, the judgment will be reversed ; if the excess, however, be remitted, the high court will render the proper judgment. *Green v. Robinson*, 3 How. 104.

42. See *Bills of Exchange and Promissory Notes*, 37; for judgment by default and calculation of interest and damages for protest by clerk.

43. A judgment rendered for "\$500.14, the amount of the promissory note, in the declaration mentioned as the costs," is informal, yet substantially good. *Warbington v. Norris*, 3 How. 227.

44. Where there is a judgment against vendor, the vendee is a purchaser with notice. *Phillips v. Lane*, 4 How. 122.

45. A judgment lien may lose its priority by the act of the creditor, it is a mere security to be pursued with diligence and in good faith, and may be lost by *laches*; where, therefore, the plaintiff stayed his execution until the next term of the court, and agreed to stay it another term, and pending the stay the property was levied on by a junior execution and sold; *held*, that the junior execution would be entitled to the money. *Michie v. The Planters Bank*, 4 How. 130; the lien can only be lost by act of the plaintiff; no act of the defendant will destroy it; an injunction, therefore, while it suspends the power to execute the judgment, does not affect its lien, and on the dissolution of the injunction, the lien will take effect from the date of the judgment. *Smith v. Everly*, 4 How. 178; it must be some act of omission or commission of the older judgment creditor, that will postpone his lien; he may lose it by delay or *laches*, but mere delay to levy on property of the debtor, where the sheriff returns the execution, *nulla bona*, will not entitle a junior execution that finds the property and levies on it, to pri-

ority; nor the fact that there were doubts about the title to the property by which the junior creditor ran the risk of a lawsuit. *Lucas v. Stewart*, 3 S. & M. 231. The oldest judgment will always be entitled to the property, unless something has occurred since its rendition to discharge its lien; a levy on sufficient personal property is a *prima facie* satisfaction, which may be rebutted by showing that the levy had been legally removed; and the execution of a claimant's bond to levy the right of property, will be a legal amotion of the levy, and the lien of the judgment will be in full force. *Walker v. McDowell*, 4 S. & M. 118.

46. The lien of the judgment not only extends to the property of the defendant, but also to money made on executions against him, while it is in the officer's hands; and whether levied on the younger or older judgments, the oldest judgment will be entitled to it. *Ib.*

47. Where money is made on executions, and the older judgment has the security of sureties on a forthcoming bond forfeited in the case, and the younger judgment has no such security, still the older judgment will be entitled to the money, and will not be forced to look to his security. *Ib.*

48. See *Evidence*, 92; when judgment evidence against a privy in interest.

49. See *Execution*, 19; how far variance between judgment and execution vitiates sheriff's sale.

50. A judgment by default will be set aside on affidavit of merits and payment of costs, if the trial be not delayed thereby, though no reason be given for not having

plead before judgment. *Fore v. Folsom*, 4 How. 282.

51. Where there was a plea by one of three defendants, and a verdict thereon in favor of the plaintiff, and a judgment following in the record against the defendants generally without any entry of judgment by default against those who had not pleaded; *held*, that the judgment was regular. *Rappleye v. Hill*, 4 How. 295.

52. In an action on a joint note where one party makes default and the other pleads, separate judgments may be rendered against each. *Lynch v. Commissioners of Sinking Fund*, 4 How. 377.

53. A judgment, on motion, against the sheriff and his sureties, is erroneous, unless notice of the motion has been served on all the sureties against whom judgment is rendered. *Torrey v. Jordan*, 4 How. 401.

54. The record of a judgment in the minute book of the circuit court, is not evidence of the judgment; the whole record should be produced, writs, pleadings and judgment. *Lehr v. Hall*, 5 How. 54.

55. Where an application is made under the statute to amend a judgment, notice must be given to the opposite party. *Dorsey v. Peirce*, 5 How. 173.

56. See *Evidence*, 104; certificate of clerk of high court, evidence of reversed judgment.

57. If the original judgment is reversed on writ of error, a forthcoming bond taken on execution on such judgment is void, and a formal motion need not be made to quash it. *Hoy v. Couch*, 5 How 188.

58. See *Scire Facias*, 9; sale without reviving judgment against

deceased person, only voidable, not void.

59. See *Execution*, 28; agreement to stay, without actual stay of execution, does not destroy lien of judgment.

60. A sheriff's return of, received so much money in Union Bank bills, is not a satisfaction of the judgment. *Tutt v. Fulgham*, 5 How. 621.

61. When a judgment is reversed, the parties will occupy the same position that they did before its rendition; where, therefore, a judgment in ejectment had been rendered for the plaintiff, and he put in possession under it, and the judgment was afterwards reversed, and while the plaintiff was thus in possession, he sold certain wood, cut by the defendant off of the land in controversy, the plaintiff in the ejectment suit, will be liable to the defendant for the value of the wood, in trover; nor can such plaintiff in ejectment read the judgment and writ of *habere facias possessionem*, by which he was put in possession, as evidence in his justification. *Harris v. Newman*; 5 How. 654.

62. Judgment without service of process is void. *Ayer v. Bailey*, 5 How. 688; see *Process*, 12.

63. See *Bills of Exchange and Promissory Notes*, 3; when judgments against maker and indorser separately, and forthcoming bonds are forfeited, one on judgment against maker, and the other against the indorser, one forfeiture will not be a satisfaction of the other; but it would be otherwise if the suits were joint, on a joint, or joint and several liability; in such case, bond given by one defendant would release the others not uniting in it.

64. Judgment by default on a note for a certain sum payable in cotton, is final. *Rankin v. Sanders*, 6 How. 52.

65. A judgment against an administrator individually, in a suit on a debt due by his intestate, may be amended at any time to conform to the suit. *Hoggatt v. Montgomery*, 6 How. 93.

66. On demurrer to a suit on an administrator's bond, alleging as a breach a *devastavit* and the non-payment of a judgment rendered against the administrator, the judgment overruling the demurrer will be final without the intervention of a jury. *Ib.*

67. Void judgments may be attacked collaterally. See *Executor and Administrator*, 92.

68. The lien of a judgment it seems may be destroyed by passive negligence in enforcing it, as well as by instructions not to levy, or giving a stay; but what degree of passive negligence will destroy a lien it seems difficult to determine; the mere fact that a younger judgment has used unusual diligence in ascertaining property and levying on it, will defeat an older judgment which has used only ordinary diligence. *Robinson v. Green*, 6 How. 223.

69. But a junior execution that makes the money will hold it in preference to a senior execution not levied. *Ib.*

70. See *Pleading*, 67; where demurrer to plea in abatement overruled, the judgment must be *respondet ouster*.

71. Where two are sued in assumpsit and the writ is returned "executed" on one and "not found" as to the other, and the former pleads and a judgment on verdict against him is rendered, and no dis-

position made in the record as to the other defendant, it will be error. *Davis v. Tiernan*, 2 How. 786; *Dennison v. Lewis*, 6 How. 517; so, also, if judgment is rendered against them all. *Hughes v. Evans*, 4 S. & M. 737.

72. Where there are several pleas, and issues are taken on some, and demurrers filed to others, if the demurrers, or either of them, be overruled, the judgment will be final for the defendant; where, therefore, the record shewed a plea of general issue and two special pleas containing bars to the action, and there was a verdict and judgment rendered for the plaintiff on the general issue, and no disposition made of the demurrer, the court of appeals will reverse the judgment on the verdict and render a judgment final for the defendant on the demurrers. *Bailey v. Gaskins*, 6 How. 519; yet it is in the discretion of the court to enter the judgment final or to grant the plaintiff leave to withdraw his demurrer and file a replication. *Gwin v. M'Carrol*, 1 S. & M. 351; and that leave should be granted when applied for. *Vicksburg Water Works and Banking Co. v. Washington*, *Ib.* 536; but its refusal by the court below is no ground of error. *Ib.*

73. An execution on a junior judgment may be levied on property bound by a senior judgment; and in such case when a sale takes place under such levy the money will be appropriated to the junior judgment, and the property will be still subject to the lien of the elder judgment, and the junior judgment will be entitled to the money, even though the execution on the older judgment was in the hands of the sheriff at the time of sale, if it was not actually levied. *Bibb v. Jones*,

7 How. 397; *Commercial and Railroad Bank v. Heldeburn*, 6 How. 536; *Goode v. Mayson*, 6 How. 543; and the rule is the same whether the older judgment be in the circuit court of the United States or the state court. *Andrews v. Wilkes*, 6 How. 554; *Commercial Bank of Manchester v. Coroner of Yazoo County*, 6 How. 530: and the rule is the same though the execution on the older judgment be levied on the same property on the day of, and before the sale of it under the junior judgment; but the purchaser will take it subject to the lien of the older judgment. *Calmes v. Ford*, 6 S. & M. 190; if, however, both be levied together, the oldest will take it, if nothing intervenes to cause the loss of its lien. J. being a judgment creditor of V. sued out his execution; D., having an older judgment by three days, afterwards sued out his execution, and both were levied the same day on two slaves of V. Before the levy, J. gave an indemnifying bond; two days after it, D. gave a similar bond. Soon after and before the disposal of these levies, D. sued out an alias execution to a different county and had it levied on another slave of V., but afterwards, finding his first levy sufficient, and relying on it, he released his second levy; the slaves first levied on having been sold, it was held, the proceeds should be appropriated to D.'s judgment. *Jennings v. Dennis*, 6 S. & M. 379.

74. A judgment erroneous on its face will be reversed, though the bill of exceptions defectively sets out the evidence. *Ib.*

75. A judgment recovered in one county is a lien on the property of the defendant in any county in the state. *Commercial and Rail-*

road Bank v. Heldeburn, 6 How. 536.

76. Judgments at law are assignable and courts of law will protect the rights of the assignee; where, therefore, a judgment was obtained by a bank against one of its debtors, and a third person, at the instance of the judgment debtor, paid the amount of the judgment and took an assignment of it, and the bank credited the account of its judgment debtor with the sum thus paid, it was held no satisfaction of the judgment. *Tombigby Railroad Co. v. Bell*, 7 How. 216.

77. Where a judgment has been rendered against an intestate in his lifetime, and he die before satisfaction of it is had, and his estate is reported insolvent, the lien of the judgment and its right to prior satisfaction out of the effects of the intestate will not thereby be affected; but it would be otherwise with judgments against the administrator before declaration of insolvency; they will only be entitled to their *pro rata* portion. *Dye v. Bartlett*, 7 How. 224.

78. Where a number of defendants are sued in assumpsit, and process is served on some and not on others, and those on whom process is served make default, and a judgment final is entered against them, and the cause continued for alias process for the others, who, on being served, appear and plead to the action, and the court, on their motion, discontinue the suit as to them in consequence of the previous judgment, it will be error; the judgment by default should not have been entered final until the ultimate disposition of the case as to all the defendants; but the other defendants were not entitled to a discontinuance in consequence of such erro-

neous entry. *Prewett v. Caruthers*, 7 How. 304.

79. If the officer levy on sufficient property and waste it, it will be a satisfaction of the judgment. *Kershaw v. The Merchants Bank of New York*, 7 How. 386.

80. A levy on personal property creates a presumption of satisfaction, but that presumption may be rebutted by other proof. *Ib.* *Bibb v. Jones*, 7 How. 397; *Pickens v. Marlow*, 2 S. & M. 428; *Walker v. M'Dowell*, 4 S. & M. 118; the execution of a claimant's bond to try the right of property will be a legal amotion of the levy. *Ib.*; and a voluntary restitution of the property to the defendant, by the sheriff, would remove the *prima facie* satisfaction and revive the lien of the judgment. *Walker v. M'Dowell*, 4 S. & M. 118.

81. Where a sheriff returns on an execution, that he had levied it on six slaves to pay the sheriff's fees, it was held not to be a *prima facie* satisfaction of the judgment. 7 How. 397.

82. Under the statute of this state, giving the judges of the circuit court the same authority in vacation as in term time, to correct and amend judgments of the circuit court, by the papers in the cause, a circuit judge will have power in vacation on due notice to the adverse party, to correct a judgment two years and six months after its rendition, which was rendered by *nil dicit* in an action of debt on a bond, for the damages only, and not for the principal debt by having it entered for the principal debt and damages. *Graves v. Fulton*, 7 How. 592.

83. Where a correction is made in a judgment in vacation under the statute, it cannot afterwards in term time be set aside and vacated

on motion without notice to the adverse party. *Ib.*; not even to insert the amount of the judgment where it was entered by default and the clerk omitted to specify the sum. *Poole v. M'Leod*, 1 S. & M. 391; and no original judgment can be amended after forthcoming bond given and forfeited. *Burns v. Stanton*, 2 S. & M. 457; judgments can only be amended in the mode pointed out by the statute. *Russell v. M'Dougall*, 3 S. & M. 234.

84. After judgment at law a court of chancery has no jurisdiction to revise the subject-matter of the suit at law. *Houston v. Royston*, 1 S. & M. 238.

85. An appeal or writ of error lies, at law, only from final judgment. *Porter v. Deterly*, 1 S. & M. 163.

86. A judgment of the circuit court will not be reversed because the clerk below certifies that the note sued on is different from that described in the declaration. *Barfield v. Impson*, 1 S. & M. 326.

87. Where a plea in abatement is filed and demurred to, it is error to render judgment final against the defendant as on default, without disposing of the demurrer. *Rowley v. Cummings*, 1 S. & M. 340.

88. A judgment without notice is void and may be inquired into directly or collaterally; and it must appear of record that notice was given, either actual or constructive. *Gwin v. M'Carroll*, 1 S. & M. 351; *Prentiss v. Mellen*, *Ib.* 521.

89. See *Appeal*, 19; judgment must be rendered against all the parties in an appeal bond given for a jury trial in the justices' court.

90. A judgment cannot be given on a verdict which varies substantially from the issue. *M'Coy v. Rives*, 1 S. & M. 592.

91. A judgment may be attached or garnisheed. *Gray v. Henby*, 1 S. & M. 598.

92. See *Partners*, 17; when judgment in favor of a surviving partner is revived by administrator of deceased partner.

93. See *Assignor and Assignee*, 5; by whom, suit must be brought on an assigned judgment which belonged to a bankrupt.

94. A levy of an execution upon real estate and the postponement of the sale thereof for a period of twelve months, by the defendant therein taking the benefit of the valuation law, will not remove or destroy the lien of such judgment; and if the land levied on, when sold, do not pay the amount of the judgment, the execution on the judgment may be levied on other land of the defendant sold under a junior judgment pending the stay occasioned by the valuation law, and the purchaser under the last sale, being on the oldest judgment, will hold the property. *Pickens v. Marlow*, 2 S. & M. 428.

95. Under the act of February 6, 1841, prohibiting the liens of judgments out of the county of their rendition, until an abstract of the judgment be filed in the other counties, where executions issue to a county different from that where the judgments were rendered and no abstract of either is recorded in such county, the execution which comes first to the hands of the sheriff and is first levied, though on the junior judgment, will take the priority. *Gresham v. Roberts*, 2 S. & M. 471.

96. Where a year and day have elapsed after the rendition of a judgment upon a forfeited forthcoming bond, without the issuance of an execution, the judgment must

be revived by *scire facias*. *Abbott v. Hackman*, 2 S. & M. 510.

97. The affirmance of a void judgment from technical causes, as an imperfect record, does not render it valid. *Pender v. Felts*, 2 S. & M. 535.

98. The judgment against an administrator must not be *de bonis propriis*; but in his representative capacity. *Hill v. Robeson*, 2 S. & M. 541; *Neely v. Planters Bank*, 4 S. & M. 113.

99. See *Pleading*, 85; where judgment is general and some of the counts are bad.

100. See *Scire Facias*, 10; after judgment on *scire facias*, defects in the original judgment cannot be noticed.

101. See *Scire Facias*, 11; discontinuance as to one party to a judgment discontinues it as to all.

102. Where the high court of errors and appeals have rendered a judgment, either of affirmance of the judgment of the circuit court, or have rendered such judgment as the circuit court should have rendered, it is the duty of the clerk of the circuit court to issue an execution upon that judgment, on a certificate of the clerk of the supreme court of the rendition thereof. *Morton v. Simmons*, 2 S. & M. 601.

103. Where a judgment is rendered in the court below on a forthcoming bond, and all the defendants but one prosecute a writ of error, and the high court affirms the judgment, and execution is awarded on that affirmed judgment against the parties to the writ of error and the sureties in the writ of error bond, it is not erroneous, that the party who did not join in the writ of error is no party to such judgment and execution; he will be li-

able to an execution on the original forthcoming bond. *Ib.*

104. See *Parties*, 15; the insertion in the prefix to the record of the judgment, of a name not a party to the suit, will not vitiate the judgment.

105. Judgments are a lien on the interest the defendant in execution actually has, and purchasers under judgments acquire only such right where they have notice of its nature. *Simmons v. North*, 3 S. & M. 67.

106. See *Recognizance*, 4; a change of time of holding court will not affect judgment on process returnable to the old time of court.

107. It is error to render judgment by default where the parties have agreed to consider a plea filed and issue joined. *McEwin v. The State*, 3 S. & M. 120.

108. On the affirmance by the high court of errors and appeals of a judgment of an inferior court, the lien of that judgment in the inferior court is not extinguished, satisfied, merged, or in any way affected thereby; nor does the judgment, rendered by the high court upon the appeal or writ of error bond against the principal and his sureties, extinguish or affect the lien of the original judgment; that lien continues in full force, and after such affirmed judgment dates back to the date of the first judgment below. *Planters Bank v. Calvit*, 3 S. & M. 143; *idem*, *Montgomery v. McGimpsey*, 7 S. & M. 557; the rule will be the same though a *capias ad satisfaciendum* had, previously to the writ of error, been sued out on the judgment. *Kilpatrick v. Dye*, 4 S. & M. 289. A purchaser under an execution, issued by the clerk of the circuit court against the principal and sureties on the writ of error bond, upon

the certificate of the high court of errors and appeals, of an affirmance by that court of a judgment of the circuit court, of land mortgaged by the judgment debtor between the time of the rendition of the judgment of the circuit court and its affirmance by the high court of errors and appeals, acquires a superior title, and will be preferred to the mortgagee. *Montgomery v. McGimpsey*, 7 S. & M. 557; and where such judgment was affirmed with damages, and the land was sold for enough to pay the damages as well as the judgment and costs, it was held, that the purchaser acquired a title unincumbered by the mortgage, and the most that the mortgagee could claim would be the amount of the damages as a sum not covered by the elder judgment, and that must be claimed of the judgment creditor, and not of the purchaser. *Ib.*

109. In an action of debt on a bond, with conditions, when the declaration alleges special breaches, the judgment by default must not be final, but with a writ of inquiry, and a jury must be empanelled to ascertain the damages. *Russell v. McDougall*, 3 S. & M. 234.

110. Judgments obtained by fraud may be set aside upon proper proceedings for that purpose. *Ross v. Lane*, 3 S. & M. 695.

111. If the officers of court have judgment against a bank, and the bank have a judgment against them, the court will order a judgment in favor of the officers, to be credited on the judgment in favor of the bank, if the latter exceed the former. *Officers of Court v. Bank of Port Gibson*, 4 S. & M. 431.

112. A person claiming to be the assignee of a judgment in favor of A. against B., cannot object

to a set-off of that judgment against a judgment B. has against A. in the same court, without producing evidence to the court, of the assignment of A.'s judgment to him; whether he could object to the set-off at all in a court of law? *Quære. Ib.*

113. A levy by attachment on land will prevail over a junior judgment, even though the judgment in the attachment be younger than the other judgment. *Redus v. Wofford*, 4 S. & M. 579.

114. It is a good plea to an action of debt, founded upon a judgment rendered in another state, that the defendant had no notice of the proceedings in the suit in that state in which the judgment was rendered; and if the plaintiff design to rely on the appearance of the defendant as an answer to the want of notice, he should reply to that effect. *Wright v. Weisinger*, 5 S. & M. 210.

115. Where in an action on a judgment rendered, in a different state, the defendant pleaded, 1. *Nul tiel record*, and 2. That he had no notice of the proceedings on which the judgment was founded; and the court, upon issue to the first plea, decided against the defendant, and sustained a demurrer to the second plea; *held*, the record of the judgment sued on, showing the appearance of the defendant, that although the demurrer was improperly sustained, yet as the decision was substantially right, and the ends of justice would be best subserved by an affirmance, the judgment on the demurrer should be affirmed. *Ib.*

116. See *Appearance*, 2. The recital in the record "This day came the parties," &c., will uphold a judgment in Alabama, and an action on

such judgment may be maintained in this state. *Ib.*

117. A plea of *nul tiel record* does not conclude with a verification, but one will not vitiate. *Ib.*

118. Where a controversy as to priority of judgment lien arose between P. B. and M., both judgment creditors of N., and the court decided in favor of M., the junior creditor in point of time, on the ground that P. B. had, by his action, postponed his priority as to M.; *held*, that this decision could not affect creditors who were not parties to it, and did not impair or invalidate the lien of P. B., except as it came in conflict with that of M. *Pickett v. Planters Bank*, 5 S. & M. 470.

119. Judgments rendered with a stay of execution, retain under the law of 1824 their lien from the date of rendition, and a sale under judgment rendered, pending the stay of execution, will not defeat the lien of the first judgment. *Ib.*

120. See *Chancery*, 167; after return of *nulla bona*, a judgment creditor may subject the note secured by deed of trust held by his judgment debtor, to the payment of his judgment in equity, and have the property sold to pay it.

121. Where there are several defendants, on all of whom process is served, and an appearance and plea as to one only, a judgment against that one, without taking any notice of the others, is erroneous. *Henry v. Halsey*, 5 S. & M. 573.

122. See *Vendor and Vendee*, 25, 31, 32; a judgment is a lien only on the actual interest of the defendant, and therefore does not bind real estate, the purchase-money of which is not paid, so as to cut out the lien therefor.

123. In all cases where judg-

ments or decrees are admissible as evidence, as a medium of proving the facts on which they are based, the parties must be the same or in privity; and the better rule seems to be, that when a decree of a court of chancery is relied on, the proceedings on which the decree was predicated should accompany it; therefore in an action for breach of an injunction bond, the record of the mere decree dissolving the injunction, which does not specify all the parties, and contains none of the previous proceedings, is inadmissible. *Goddard v. Long*, 5 S. & M. 782.

124. See *Pleading*, 125; when the demurrer to a replication is overruled, the court cannot render judgment final for the plaintiff, where the amount is not ascertained without calculation, but must award a judgment with a writ of inquiry.

125. Upon a demurrer to a plea *puis darrein continuance* being sustained, the judgment of the court under the statute H. & H. 615, § 8, should be *respondeat oster*. *McDugald v. Mississippi Union Bank*, 6 S. & M. 333.

126. A judgment may be assigned by the judgment creditor to a third party; by such assignment the beneficial interest in the judgment will pass to the assignee, who will have the right to use the name of the judgment creditor to enforce the execution. *Vanhouten v. Reily*, 6 S. & M. 440.

127. See *Executor and Administrator*, 108; for right of judgment creditor, though distributee of an estate, to enforce execution against the estate after distribution.

128. See *Executor*, 109; a judgment against an executor, after he has resigned his office, is a nullity.

129. See *Vendor and Vendee*, 31; for the extent of the lien of a judgment on the property of a vendor, who has given a bond for title only, and how it can be enforced.

130. A judgment without notice, and without the appearance of the party against whom it is rendered, is a nullity, and may be shown to be so even when it comes collaterally in question. *Enos v. Smith*, 7 S. & M. 85.

131. A judgment by default final is erroneous where the action is in debt on two bills single, a promissory note, and an open account; it should have been with a writ of inquiry. *Sandford v. Campbell*, 7 S. & M. 107.

132. In a suit against two defendants, one of whom makes default, and the other pleads, it is error to take judgment at one term against one for a certain sum by default; and a verdict and judgment on the issue against the other, at a different term for a different sum. *Falconer v. Frazier*, 7 S. & M. 235.

133. Where a plea has been filed, and a demurrer to it sustained, and under the judgment *respondeat oster*, another plea filed, the demurrer to which is overruled by the court below, but sustained on appeal to the high court of errors and appeals, the judgment of that court will be *quod recuperet*. *Atkinson v. Fortinberry*, 7 S. & M. 302.

134. Where a demurrer to a plea is overruled, it is error to render judgment final; it should be, *respondeat oster*. *Lang v. Fatheree*, 7 S. & M. 404; so also, where a demurrer to a plea is sustained. *Heyfron v. Miss. Union Bank*, 7 S. & M. 434.

135. Where the circuit court set aside an entry of satisfaction and

awarded an execution, *held*, that the judgment of the court in so doing could not be collaterally questioned; it was correct and conclusive until reversed. *Brooks v. Whitson*, 7 S. & M. 513.

136. A court of equity will limit the lien of a judgment to the interest which the judgment debtor actually had in the property at the time the judgment was rendered; so far, at least, as to protect the prior equities of third persons. *Jenkins v. Bodley*, 1 S. & M. Ch. 338.

137. Where the plaintiff, in a judgment rendered in a sister state, comes here to enforce it, it is entirely competent for the defendant to show that the judgment was obtained by fraud, which vitiates judicial acts and renders them utterly void. *Fletcher v. Rapp*, 1 S. & M. Ch. 374.

138. A judgment in this state of older date than the registration of a mortgage, though junior to its execution, will be a prior lien upon the land embraced in the mortgage. *Bingaman v. Hyatt*, 1 S. & M. Ch. 437.

139. The interest of a grantor, in a deed of trust, is not subject to seizure and sale under execution at law; nor is the interest of a *cestui que trust*, unless there is a mere legal title in the trustee; a judgment at law is not a lien upon a mere equitable interest at law. *McIntyre v. Agricultural Bank*, Freem. Ch. 105.

140. A levy under execution is *prima facie* satisfaction of the judgment, subject to be rebutted; where, therefore, judgment is recorded in separate suits against a maker and an indorser of a note, and execution on the former is levied, and forthcoming bond forfeited, on

which the sheriff returns that he has received a certain sum in depreciated money; *held*, that it was no satisfaction of the latter judgment. *McNutt v. Wilcox*, Freem. Ch. 116.

141. It seems that the delay or failure of a plaintiff in a judgment at law, to enforce his judgment for nearly four years, is to be regarded as fraudulent as to *bona fide* purchasers from the judgment debtor. *Speight v. Adams*, Freem. Ch. 318.

JUDGMENT NON OBSTANTE VEREDICTO.

A judgment *non obstante veredicto* cannot be rendered after a judgment upon the verdict has been entered; the rule on that subject is, that the motion for such judgment must be made immediately after the verdict, and before a judgment is rendered on it. *The State v. The Commercial Bank of Manchester*, 6 S. & M. 218.

JURISDICTION.

1. Courts have no jurisdiction over the dead, unless represented as required by law. *Gerault v. Anderson*, Walk. 30.

2. Where the constitution of the state does not define the jurisdiction of the supreme court, but leaves it to the legislature to do it, a statute authorizing an inferior court, when it doubts as to the law, to transfer the case, before final judgment, is constitutional. *Blanchard v. Buckholt*, Walk. 64.

3. Where an inferior court makes such transfer, the order will be valid, though it contain no reasons for the transfer. *Ib.*

4. See *Roads*, 4, 5, as to jurisdiction of county courts in laying out roads, and how far the power delegated must be strictly pursued. *Stockett v. Nicholson*, Walk. 75.

5. The defects in the proceedings of county courts cannot be established by parol; the proceedings must be recorded, and proved by the record. *Ib.*

6. See *Venue*, 1, as to jurisdiction, where freeholder is sued out of his county. *Spain v. Winter*, Walk. 152.

7. See *Justice of Peace*, 4, as to division of account, to give jurisdiction.

8. The supreme court has no jurisdiction of an appeal from the interlocutory decree of the chancellor, unless the circumstances required by the statute exist. *Revised Code*, 93, § 37; *Linn v. Kyle*, Walk. 315.

9. See *Interest*, 5, for jurisdiction of circuit court of note for fifty dollars exactly.

10. To give the high court of errors and appeals jurisdiction of a case sent up to it on doubts from the circuit court, (if the high court have jurisdiction at all, of which, *quære?*) the whole record must be sent up, and the point on which the circuit judge doubted, affirmatively appear. *Caraway v. The Board of Police of Yazoo Co.* 1 How. 21.

11. The high court will always inquire whether it has jurisdiction of a case, even though the parties do not raise the point. *Stamps v. Newton*, 3 How. 34; to give jurisdiction, a judgment must be shown. *Rogers v. McDaniel*, 3 How. 172.

12. See *Venue*, 4, for jurisdiction on change of.

13. See *Justice of Peace*, 9, for jurisdiction over corporations.

14. See *Circuit Court*, 6, for

jurisdiction where all the parties defendant live out of the county.

14. Consent cannot give jurisdiction where it is withheld by the constitution. *Hurd v. Tombes*, 7 How. 229; or is not authorized by law. *Bell v. Tombigbee Railroad Co.* 4 S. & M. 549.

15. A court having once acquired jurisdiction, does not lose it by any change of circumstances. *Read v. Renaud*, 6 S. & M. 79.

16. The fact that both parties to a suit in chancery in the state courts claim the land in controversy under a treaty to which the United States is a party, has in itself nothing to exclude the jurisdiction of the state court. *Land v. Land*, 1 S. & M. Ch. 158.

See *Chancery*, tit. *Jurisdiction*; *Probate Court*; *Circuit Court*; *Justice of Peace*, and *High Court of Errors and Appeals*.

JURY.

1. See *New Trial*, 6, 7, 8, 9. It is error for jury to take out papers not read on trial, to disperse without permission of court, or to examine witness except in open court. *Offit v. Vick*, Walk. 99.

2. See *Criminal Law*, tit. *Jury*; as to what opinion disqualifies juror.

3. See *Instruction*, 1; as to charge to jury.

4. The verdict of a jury, without showing that they were sworn, and that an issue was submitted to them, is erroneous, and the judgment will be reversed; and the phrase, the jury say "on their oaths," &c., will not be sufficient to show that they were sworn. *Beall v. Campbell*, 1 How. 24; *Wolfe v. Martin*, 1 How. 30; *Ir-*

win v. Jones, Ib. 497; sed vide Sumpter v. Geron, 4 How. 263.

5. A verdict by a jury of thirteen persons is erroneous, *Ib.*; *sed aliter*, it is not erroneous. *Tillman v. Ailles, 5 S. & M. 373.*

6. A juror, in a capital case, must be either a *freeholder* or *householder*, and to be neither is a ground of challenge. *Byrd v. State, 1 How. 163.*

7. The qualifications of the special *venire* are the same as those of the general *venire*; no length of time of citizenship is requisite to qualify a juror. *Ib.*

8. Though the legislature cannot alter or abolish the number of the jury, yet they can constitutionally prescribe the qualifications of those who shall compose it. *Ib.*

9. Under the statutes of this state regulating the panel of jurors, and who shall constitute the regular *venire*, and conferring jurisdiction on the circuit courts as courts of *oyer* and *terminer*, and general jail delivery, they have power, in a criminal case, to issue a *venire*, in term time, tested of that term, for thirty-six jurors, returnable at the same term in six days. *Shaffer v. The State, 1 How. 238; Woodsides v. State, 2 How. 655.*

10. Where the *venire* required the sheriff to summon thirty-six good and lawful men, &c., *as near as may be* to the place of murder, it was *held* to be erroneous. *Ib.*

11. Where it appears, in an indictment, that the grand jury were of the proper county, it will not be error that the indictment terms them, "grand jurors of the state of Mississippi." *Ib.*

12. The sheriff's return of "served a true copy of indictment, *venire facias*, and *venire*, on the prisoner," sufficient evidence of

service of list of jury on the prisoner. *Ib.*

13. Defect in summoning the *venire*, and serving the copy of it on prisoner, is cured by the prisoner's going into trial. *Ib.*

14. How far regular *venire* of grand jurors can be objected to after verdict, where it is not part of the record by bill of exceptions. See *Circuit Court, 2 and 3.*

15. It is no ground of challenge to the *venire*, that "at the time the persons summoned on the original *venire*, to serve as jurors at the then term were drawn, there was not among the records or papers of said court; or in the books thereof, any list of persons so taken and returned by the assessor, as aforesaid, or any copy of such list;" the law requires the list of jurors to be deposited in a *box*, to be drawn at court; and it is not to be kept among the records or papers of the court. *Stevens v. Richer, 1 How. 522.*

16. It is no ground of challenge to the array, that one of the jurors placed upon the panel is disqualified; such challenge relates to the act of the sheriff in arraying the panel, and not the character of the jurors. *Woodsides v. The State, 2 How. 655.*

17. A jury of eleven men vitiates the verdict. *Dixon v. Richards, 2 How. 771; Carpenter v. The State, 4 How. 163; Bone v. McGinley, 7 How. 671.*

18. See *Criminal Law*, tit. *Jury*, for appointment of foreman of grand jury.

19. The record must show that the grand jurors were sworn, and the statement in the indictment to that effect will not be sufficient. *Cody v. State, 3 How. 27.*

20. It is ground for a new trial

if one of the jurors, before the trial, declare, that should he be of the jury he could not clear the accused, but would be bound to find him guilty. *Ib.*

21. See *Criminal Law*, tit. *Jury*; person not sworn going into jury-room, ground for new trial.

22. The statutes of this state, limiting the right to challenge the array, are not unconstitutional, as infringing the right of trial by jury. *Hare v. State*, 4 How. 187.

23. See *Criminal Law*, tit. *Jury*, for qualification of juror who has impressions unfavorable to prisoner, but formed and expressed no opinion.

24. Where a juror stated that he was surety for one of the parties to the suit, on a debt not involved in the suit, and that a judgment against such party, who was already insolvent, would affect that party's ability to pay the debt he was surety for, and that he felt himself unfit to sit on the case before the court; *held*, that the juror was incompetent, and should have been excused; if, however, he be sworn for the trial, and be peremptorily challenged afterwards, and do not sit in the case, it will not be error to the prejudice of either party, as he did not participate in the verdict. *Ferriday v. Selcer*, 4 How. 506.

25. See *Sheriff*, 28; on motion against sheriff and his sureties, they are not entitled to trial by jury, and if they were, that right can be waived.

26. Affidavits of jurors inadmissible to impeach their verdict. *Friar v. State*, 3 How. 422.

27. It is for the jury, and not the court, to draw presumptions from the facts proved. *Dickson v. Moody*, 2 S. & M. 17.

28. On motion to enter satisfaction of a judgment; it is not necessary for a jury to be empanelled. *Planters Bank v. Spencer*, 3 S. & M. 305.

29. It will be no objection to the verdict and judgment, that the record does not give the names of the individuals composing the jury; and if the record recite, that "*a jury*" passed upon the case, it will be construed to mean twelve men duly qualified, unless the record itself show the contrary. *Redus v. Wofford*, 4 S. & M. 579.

30. Where a grand jury were empanelled, of which twelve persons were taken from the regular *venire*, and that being then exhausted, two other persons were taken from by-standers summoned by the sheriff; *held*, that the grand jury were properly organized. *Dowling v. The State*, 5 S. & M. 664; *Johnston v. The State*, 7 S. & M. 58.

31. Whether objections to the personal qualifications of grand jurors, or to the legality of the returns, can affect any indictments found by them, after such indictments have been received and filed by the court, *quære?* *Ib.*

32. Where by-standers have been summoned by the sheriff, to complete the panel of the grand jury, in the absence of a sufficient number of the regular *venire*, and the record does not affirm that such by-standers had the requisite qualifications, the law will presume, until the contrary be made to appear, that they had the proper qualifications. *Ib.*

33. The statute which limits the number of peremptory challenges, in capital cases, on the part of the prisoner, to twelve, is not an infringement of the clause in the

constitution which provides "that the right of trial by jury shall remain inviolate;" the trial by jury is twelve free and lawful men, who are not of kin to either party, for the purpose of establishing, by their verdict, the truth of the matter which is in issue between the parties; any legislation, therefore, which merely points out the mode of arriving at this object, but does not rob it of any of its essential ingredients, cannot be considered an infringement of the right. *Ib.*

34. Where a jury, in the trial of an action for assault and battery, after having retired to make up their verdict, agreed, immediately upon entering into the jury-room, that each should put down a sum which should be divided by twelve, and that the result should give the amount of damages to be found by their verdict; and this agreement was carried out and acted on; *held*, that the verdict, so found, was irregular, and should be set aside. *Parham v. Harney*, 6 S. & M. 55.

35. Whether the affidavits of jurors to establish the conduct of the jury while in the jury-room are admissible, on a motion for a new trial, *quære*? *Ib.*

36. Although persons not of the jury intrude upon them in their retirement, and one of the jury during their retirement separates himself from his fellows, for a period, yet these facts, though irregularities and reprehensible, will not be grounds for reversing the judgment, when it does not appear, by the record, that any influence was attempted on the jury, or the absentee, to procure the verdict rendered by them. *Graves v. Monet*, 7 S. & M. 45.

JUSTICE OF THE PEACE.

1. Where the statute required that appeals from justices of the peace shall be tried in the circuit court *de novo*, on issue to be made up at, or before the trial, it will be error to try such an appeal in the circuit court, without such an issue. *Lindsay v. Herd*, Walk. 18; *Horn v. Gillock*, *Ib.* 107.

2. See *Forcible Entry and Detainer*, 5. The justice cannot reject jurymen without cause. *Lewis v. Sulzer*, Walk. 21.

3. For *certiorari* from justice of the peace, when it lies, see *Certiorari*, 2, 3. *Duggin v. McGruder*, Walk. 112.

4. A party cannot divide an account, composed of various items, so as to give jurisdiction to a magistrate. *Grayson v. Williams*, Walk. 298.

5. Where the statute permits the affidavit for a distress warrant to be made before a justice of the peace of the county, a justice of the peace for the city cannot take it. *Vannerson v. Staunton*, Walk. 358.

6. See *Attachment*, 5, as to power to deliver attached property to plaintiff.

7. A justice of the peace has jurisdiction to allow an offset of a greater sum than his court has jurisdiction of; and where the excess does not exceed the jurisdiction of the justice, he may render judgment for it. *Glass v. Moss*, 1 How. 519.

8. Justices of the peace, under the act of 1836, are notaries public, *ex officio*. *Wilcox v. Mitchell*, 4 How. 272.

9. Under the constitution of this state, giving justices of the peace jurisdiction of sums not exceeding

fifty dollars, they have jurisdiction of suits against corporations for sums within their limit; and they can issue process against them under the statute of 1839, which provides that *all writs and process, either at law or in equity*, may be tested and returnable against corporations as against natural persons; that statute embraces justices of the peace who can proceed by summons against corporations, as in other cases. *Loomis v. Commercial Bank of Columbus*, 4 How. 660.

10. A justice of the peace has jurisdiction of a suit on a note for fifty dollars, payable twelve months after date, and bearing interest from date, at the rate of six per cent. per annum, and may render judgment for principal and interest, though they jointly exceed fifty dollars; the constitution and laws, giving justices jurisdiction where the *principal* of the sum in controversy does not exceed fifty dollars. *Planters Bank v. Coulson*, 6 How. 395.

11. See *Circuit Court*, 10, for jurisdiction of appeals and *certiorari*, from justice's court.

12. See *Appeal*, 19; judgment shall be rendered on appeal bond for jury trial in justice's court, against all the parties, on *certiorari*.

13. Proceedings in causes, before brought from justice's court, are *de novo*, and without any pleadings whatever, in circuit court. *Wright v. Simmons*, 1 S. & M. 389.

14. See *Evidence*, 137; justice of peace witness as to what a person testified to before him, when written statement lost, and effect of that written statement.

L.

LAND LAWS OF THE UNITED STATES.

1. The act of congress of 1803, donating lands to certain persons, itself, with the proceedings of the board of commissioners, confers title. See *Title*, 1, 2. *Hackler v. Cabel*, Walk. 91.

2. See *Spanish Laws and Claims*, 4-8, as to conflicting titles to land, and confirmations by the United States, and the effect of patents. *Winn v. Cole*, Walk. 119.

3. The officers of government should give the patent to him who is by law entitled to it; and if they give it to another, he is a trustee for the true owner; if a government, by mere act of power, make a grant, and give title to a second person, after having granted previously to a first, the court will respect the title of the first grantee. *Stark v. Mather*, Walk. 181.

4. The confirmation by congress of a Spanish title shall relate back to the origin of the title. *Ib.*

5. Where A. received a grant of lands from the Spanish government, which was revoked by them by an arbitrary act of power, and the land regranted to B., and A. driven from the country, and B.'s title confirmed by the board of commissioners of the United States, B. shall be decreed to hold as trustee for A. *Stark v. Mather*, Walk. 181.

6. The decisions of the board of commissioners, under the acts of 1803, respecting the public lands, are final, as regards the United States. *Ross v. Barland*, Walk. 489. See *Chancery*.

7. See *Real Estate*, *passim*, for laws with reference to lands, and decisions on acts of congress.

8. By act of congress, passed in 1832, Jefferson College, in consideration of certain relinquishments, was authorized to enter a certain amount of land, not more than two sections in one body; the register to issue a certificate of entry, upon which a patent was to issue; it was further provided that the college might, under its corporate seal, transfer the right of location, in whole or in part, and authorized the assignee, on lodging with the register the deed of assignment, to receive a certificate of entry, which the act provided should be held as valid and complete as if a patent had issued; that the assignee of the college by such certificate acquired a complete title, as fully as if by patent, and that the possession of the certificate by such assignee, would be evidence that the deed of assignment, under seal of the college, had been made. *Fulton v. M'Affee*, 5 How. 751.

9. Where a certificate called for two sections of land, the holder of it will not be limited to twelve hundred and eighty acres; if the sec-

tions contain more he will be entitled to all the land embraced within their boundaries, as established by survey. *Ib.*

10. In a controversy between the holder of such certificate of entry and a junior patentee to the same land, who claims by virtue of a prescription, under the law of 1834, the junior patentee, in order to cut out the certificate, which was of elder date, must show affirmatively, that all the requisites to entitle him to the preëmption were complied with, and as the preëmption law required that the party must have been in the preceding year both in possession and in cultivation of the land, proof of mere possession will not be sufficient, nor will proof of a settlement and improvement on the land be evidence of cultivation; and as the act requires that this proof shall be made before the register and receiver of the land-office, proof that it was made before the register alone, will not be sufficient. *Ib.*

11. And where the holder of such junior patent sought to charge the holder of such certificate with fraud in its procurement, because the junior patentee was present before the register, at the time the certificate was granted, claiming his preëmption in the premises, with witnesses to prove his settlements and improvements on the premises, it was held, that the testimony should properly be rejected, as not tending to prove fraud, because the register was right to reject the claim of preëmption, it not being proved in the mode required, nor before the proper officers. *Ib.*

12. The Spanish government never had a right of soil above the thirty-first degree of north latitude; its grants, therefore, to land above

that limit passed no title; up to the year 1802 the title was in the state of Georgia, and previous grants from Spain were of no avail; on the 24th of April, 1802, Georgia ceded the land constituting the Mississippi Territory, to the United States, and, by the terms of cession, all those who, on the 27th day of October, A. D. 1795, were actual settlers in the territory, under Spanish grants, should be confirmed in their title; it was also provided, under certain stipulations, that five million acres of the territory should be set apart, not interfering with other grants, to quiet, or compensate for other claims than those theretofore recognized; and in March, 1803, in legislating with reference to such claims, congress passed a law, that those who were resident in the territory, on the 27th day of October, 1795, in possession of land under Spanish warrants, actually inhabiting and cultivating it for their own use, &c., should be confirmed in their warrants, as fully as if their titles had been complete; *held*, that the person claiming under a Spanish grant, confirmed by the treaty of cession to the United States, would have a title paramount to one claiming under a Spanish warrant, confirmed by congress a year afterwards, even though the date of the Spanish warrant be older than that of the grant. *Nevitt v. Beaumont*, 6 How. 237.

13. In such case the confirmation in the cession completed the title, and the confirmation of commissioners added no validity to it. *Ib.*

LANDLORD AND TENANT.

1. Under the statute of this state,

27

allowing double damages to the landlord, where the tenant replevies the goods distrained for rent, found to be justly due, and in arrear, the landlord is not entitled to double damages, where he obtains a verdict for only part of the sum claimed by him as due for rent. *Terrel v. Ligon*, Walk. 170.

2. The goods of a tenant cannot be distrained by the landlord for rent, unless they have been on the demised premises. *Bradley v. Piggot*, Walk. 348.

3. See *Justice of Peace*, 5, as to power of city justice to administer affidavit to distress warrant. *Van-ner-son v. Staunton*, Walk. 358.

4. The motion on a replevy bond for rent should be for *execution*, not judgment; as the bond, after forfeiture, operates as a judgment. *Ib.*

5. See *Replevin*, 2, as to liability of claimant of property distrained for rent to double damages, where he does not get the replevied property.

6. An attachment for rent, without bond and surety by the landlord, is erroneous. *Cornell v. Rulon*, 3 How. 54.

7. See *Replevin*, 4, as to whom replevin bond for rent is to be made payable.

8. Where property distrained has been replevied, the plaintiff in replevin need not, under the statute, file a declaration; but the replevin is tried on an issue made up at court, *on the writ* of replevin. *Parkhurst v. Dunlap*, 6 How. 577.

9. The statute, authorizing executions to issue on bonds, to pay the money in three months, taken on distress for rent, by motion to the court, does not violate the constitution. *Peck v. Critchlow*, 7 How. 243.

10. Where the obligors, in a three months' replevin bond for rent, are notified that a motion will be made against them for judgment on the first day of the term, and it is not made or entered on that day, it will be erroneous to take it upon a subsequent day, unless the obligor appear voluntarily. *Phillips v. Chaney*, 7 How. 250.

11. See *Executor and Administrator*, 223; on a void sale of realty by executor, the purchaser who has made valuable improvements, will be allowed them against the rents.

LEASEHOLD INTEREST.

A lease for ninety-nine years, is a mere chattel, like a lease for any shorter or longer time, and goes to the administrator to be administered. *Dillingham v. Jenkins*, 7 S. & M. 479.

LEGACIES.

1. See *Interest*, 2, for interest on legacies charged on personal property. *Brownlee v. Steel*, Walk. 179.

2. See *Executor and Administrator*, 14, as to executor's right to recover hire of slave in possession of legatee after testator's death.

3. An executor in Kentucky may authorize legatee in this state to sue. *Hamilton v. Cooper*, Walk. 542.

4. See *Will*, 11, as to right of residuary legatee to sue for legacy as a specific legacy.

5. See *Will*, 13; and *Husband and Wife*, 22; for vested legacy and reduction to possession by husband.

6. The residuary legatee will

take whatever by lapse, invalid disposition, or other casualty, falls into the residue after the date of the will; therefore where a testator made a will, manumitting certain slaves illegally, *held*, that the residuary legatee would take them in preference to the heir at law. *Vick v. McDaniel*, 3 How. 337.

7. Legacies, and distributive shares in an estate are choses in action; and until there is a division or partition among joint legatees and distributees, it retains that character. *Wade v. Grimes*, 7 How. 425.

8. The statute of this state, enacting that "any person having a legacy bequeathed in any last will and testament, may sue for and recover the same at common law," changes the common law rule, which requires a resort to a court of equity, and authorizes a specific legatee, to maintain a suit for it at law without the assent of the executor. *Worten v. Howard*, 2 S. & M. 527.

9. As a general rule, a suit for the recovery of a legacy should be brought against the executor in the jurisdiction having cognizance of the will; yet when the fund out of which the legacy is payable is traced to the possession of the heir of the testator in a different jurisdiction, the suit may be maintained there; but where a legacy was given, payable out of a fund in Louisiana, and the testator had property in this state, which the legatee attempted to subject to the payment of his legacy, *held*, that the property in this state could not be resorted to, until the fund in Louisiana was shown to be insufficient. *Montgomery v. Millikin*, 5 S. & M. 151.

10. See *Will*, 53; where lega-

tees may be compelled to an abatement of their legacies, or to a release of a void devise.

LEGISLATURE.

See *Executor and Administrator*, 221-224. A private act of the legislature to sell real estate, is not unconstitutional; but the terms of sale must be strictly complied with, or it will be void; and such private act, if procured by fraud, will be void.

LIBEL.

1. The office of an *innuendo*, in an indictment for a libel, is to connect the libel with extrinsic facts, to show the meaning and bearing of words and phrases in it, and is necessary, when the words published would not be libellous, without such connection. *State v. Chace*, Walk. 384.

2. The court will regard the use of fictitious names and disguises, in a libel, in the same sense that they are usually understood by the public. *Ib.*

3. Everything written of another to make him ridiculous, or hold him up to scorn, and calculated to produce a breach of the peace, is a libel. *Torrance v. Hurst*, Walk. 403.

4. See *Limitations, Statute of*, 9; for limitation of action for libel.

LIFE ESTATE.

1. See *Merger*, 1. When life estate is merged in greater estate.

2. A. devised all his real and personal estate to his wife, during

her natural life, remainder over, and appointed her his executrix, with instructions to pay his debts as soon as possible, out of such funds as she should be able to appropriate to that purpose; at the time of his death, the testator was largely indebted, and the executrix paid the debts off, and filed her petition in the probate court to have a portion of the estate sold to repay her. *Held*, that the rents and profits belonged to the tenant for life, and the remainder-man was bound to contribute, in proportion to his interest, towards removing the incumbrances, and that the money the executrix had advanced was a lien on the estate. *Peck v. Glass*, 6 How. 195.

3. In order to ascertain the proportion of debt the tenant for life, and the remainder-men are to pay, the circumstances, age, state of health of the tenant for life, are to be considered and a commissioner is to be appointed, to ascertain the facts, that the court may decree accordingly. *Ib.*

4. See *Will*, 20. When remainder-men may compel tenant for life to give security.

LIMITATIONS, STATUTES OF.

1. The statutes of limitation cannot be pleaded, in bar, here; but, where the statute of another state, not only bars the remedy, but takes away the right and confers title, it may be pleaded with the averment of title acquired thereby. *Hamilton v. Cooper*, Walk. 542.

2. See *Pleading*, 23, 24, and 25; as to executors pleading statute of limitations of eighteen months, for non-presentation of claim.

3. See *Pleading*, 30 ; as to form of plea of statute of limitations, where the debt was due after date. *Slocumb v. Holmes*, 1 How. 139.

4. The exception, in the statute, of accounts between merchant and merchant, does not apply to an account for work and labor, though between merchant and merchant. *Ib.*

5. Where the bar of the statute of limitations has once run, and become a complete defence, no subsequent legislation can take away the defence, or revive the obligation barred; the right of defence, under the statute, having become vested in the party, it cannot be constitutionally taken away from him. The presumption of payment, arising under the statute of limitations, having once attached it cannot be taken away by a repeal of the act; such legislation would be retrospective. *Davis v. Minor*, 1 How. 183.

6. Where the legislature did not design to repeal the whole act of limitations, but only to shorten the period of limitation, such design should be carried out, and interpretation accordingly given to the law, even though in words it repeal the whole act. *Ib.*

7. See *Executor and Administrator*, 47 and 48. How far statute of limitations may be plead by executors and administrators against distributees, in equity, and how far by trustees.

8. The statute of limitations will not apply to payments made, but will apply to set-offs. *Barnes v. Lloyd*, 1 How. 584.

9. The statute of limitations, which provides that every action upon the case, for words, shall be commenced and sued within one year next, after the words spoken,

and not after, embraces words written, as well as words spoken. *Menter v. Stewart*, 2 How. 698.

10. A plea to an action on a judgment rendered in another state, that the cause of action did not accrue within six years, is bad. *Williams v. Guignard*, 2 How. 722.

11. The exception, in the statute of limitations, of accounts between merchant and merchant, from its operation, does not apply to the sale of a single lot of goods, however large, but only to cases where there were mutual dealings and mutual credits. *Davis v. Tiernan*, 2 How. 786.

12. An account stated, even though between merchant and merchant, is within the operation of the statute of limitations; and it is for the jury to say whether an account sued on, is an account stated or not. *Ib.*

13. Where A. sued B., on an account for merchandise, and B. plead the statute of limitations, and A. replied, it was between merchant and merchant, and therefore not subject to it, and B. traversed it, it will be competent for B. to show that the account sued on, was an account stated, and so, subject to the statute. *Ib.*

14. Where a surety, on a sheriff's bond, was sued, and the surety plead the death of his principal, and that the claim sued for had not been presented to the administrator of the sheriff, within time to save the bar of the statute, for a failure to present claims; held, to be no defence to surety. *Kerr v. Brandon*, 2 How. 910. *Ib.*; with reference to surety on note; the surety may compel the holder to present it to the administrator to save the bar. *Johnson v. The Planters*

Bank, 4 S. & M. 165; *Cohea v. Commissioners of Sinking Fund*, 7 S. & M. 437.

15. Courts of equity adopt limitations of rights, which are prescribed in the analogous proceedings at law; therefore, the remedy by a bill in chancery, to recover possession to real estate, will be barred if the defendant has been in possession more than twenty years, since the claimant became of age. *Iler v. Routh*, 3 How. 276.

16. One heir may disseize his co-heirs, and hold in adverse possession against them, as well as a stranger, even though he enter as heir, and the statute will begin to run from such disseizin; mere sole possession will not be evidence of such disseizin; it must be accompanied with a notorious claim of an exclusive right, the strongest evidence of which claim, will be a sale of the land by such disseizor, and taking to himself the whole purchase-money; force or violence are not necessary to constitute an ouster. *Ib.*

17. Where one heir took possession of the realty of his ancestor, and sold it, and his vendees used it as their own, and demonstrated in various ways their exclusive claim to it, and the other co-heir did not sue for his portion, until twenty years had elapsed, after he came of age; *held*, that his right was barred. *Ib.*

18. The statute of limitations does not run against the government; if, therefore, a suit be brought for land, in less than twenty years after the government parted with its title, the bar of the statute will not apply. *Bledsoe v. Little*, 4 How. 13.

19. Where the statute of limitations once begins to run, no inter-

vening disability stops it; where, therefore, a decree was had against an administrator, and he afterward died, the statute will continue to run from the date of the decree, notwithstanding his death, and notwithstanding no one has been appointed in his place. *McCoy v. Nichols*, 4 How. 31.

20. Where there is a life estate in slaves, the statute of limitations does not begin to run until after the death of the tenant for life, as against the remainder-men, even in favor of a vendee of the life estate. *Magruder v. Stewart*, 4 How. 204.

21. The statute of limitations, as to sealed instruments, being sixteen years, to a plea to an action of debt, on a bond, that the cause of action had not accrued within sixteen years, it will be a sufficient answer that the defendant to the suit was a resident of Virginia, and absent from the state of Mississippi, until the year 1838, and was not until then, subject to the jurisdiction of the courts of this state; the statute of this state, which prohibits the statute running while the defendant is out of the state, applying equally to the case of a person who was never in the state. *Estis v. Rawlins*, 5 How. 258.

22. See *Gift*, 1; for what possession will cause the statute to run, to give title to slaves to possessor, which are alleged to be loaned.

23. Where a party was in possession of land, under a decree of the chancery court, that he should pay a certain sum of money in a given time, and that a lien for its payment should subsist on the land, and the party remained in possession for twenty years from the time appointed for payment, the presumption will be that the money

was paid, and the title will be absolute. *Stark v. Gildart*, 5 How. 606.

24. Where the statute of limitations of six years, to open accounts and notes, excepted accounts between merchant and merchant, it seems that such accounts will not be barred, even though no dealings have occurred between the parties for more than six years prior to the institution of suit. *Fox v. Fisk*, 6 How. 328.

25. To constitute an account between merchant and merchant, the account, when the cause of action accrued, must be unsettled, current, and mutual; if the accounts be stated or closed, or if a balance has been struck and admitted, and there be no more mutual dealings between the parties, the statute will run and apply to such accounts; they will cease to be within the exception. *Ib.*

26. The statute of limitations, prescribing the time in which claims must be presented against the estate of deceased persons, cannot be set up against the state. *Parmilee v. McNutt*, 1 S. & M. 179.

27. The statute of frauds, making three years possession vest the title to personal property, does not apply, unless the possession has been for three years in this state. *Palmer v. Cross*, 1 S. & M. 48.

28. See *Executor and Administrator*, 74, 75, and 78; for what notice will save bar of the statute, requiring presentment, and when the bar will commence running.

29. Though, as a general rule, when the statute begins to run, no subsequent disability will stop it; yet a disability created by positive statute, is an exception; therefore, the period of nine months, in which

executors and administrators cannot be sued, must be added to the six years, to constitute the bar of the statute of six years, on a note made by the deceased. *Dowell v. Webber*, 2 S. & M. 452.

30. Whether the statute of this state, fixing the period in which claims must be presented against estates of deceased persons, and providing, that on a failure to present, the claim is barred, and *the estate is discharged from the debt*, is anything more than a mere statute of limitations? *Quære?* *Johnson v. Planters Bank*, 4 S. & M. 165. It is, in substance, but a statute of limitations. *Miller v. Trustees of Jefferson College*, 5 S. & M. 651; *Cohea v. Commissioners of Sinking Fund*, 7 S. & M. 437.

31. To take a case out of the statute of limitations, an express acknowledgment of the debt, as a debt, due at that time, or an express promise to pay it, must be proved to have been made within the time prescribed by the statute; a party's saying, therefore, that "he recollected the note well, had thought of it often, and expected to have heard of it before; that it was a just note, but that he had offsets against it;" will not take the case out of the statute. *Davidson v. Morris*, 5 S. & M. 564.

32. The plea to an action, to recover for a physician's bill, that the account had not accrued within three years, is bad; the limitation of three years, not applying to such a case. *Hazlip v. Leggett*, 6 S. & M. 326.

33. In 1818, a widowed mother purchased a slave, partly with funds of her own, and partly of her children, and received the slave into her possession, and in 1825, the mother having married again, her

husband conveyed the slave and her increase to the children of the second marriage; in 1833, the children of the first marriage became of age, but took no steps to assert their rights to the slaves, until 1841: *Held*, that they were barred by the statute of limitations. *Murdock v. Hughes*, 7 S. & M. 219.

34. Where a purchaser of property buys it with the money of another, the trust thereby created, in favor of the party whose money is thus used, is an implied and not an express one, and is subject to the statute of limitations, continuing express trusts forming the only class protected from the operation of the statute; where, therefore, the trustee denies the right of the *cestui que trust*, and asserts an adversary claim, it is an abandonment of the fiduciary character, and the statute of limitations will commence running from that day, if there be no disability as to the other parties. *Ib*.

35. It is not a good plea, in bar of an action, on a note, instituted in 1842, that on the 7th of May,

1839, the plaintiff recovered a judgment against the defendant, on the same note, which judgment was reversed, on error, at the January term, 1841, of the high court of errors and appeals, and that more than one year had elapsed, after the reversal of the judgment, before the plaintiff recommenced his suit; the statute, which allows an action within one year, and *not after*, from the reversal of a judgment, by the high court of errors and appeals, does not abridge the time of limitation, but enlarges the plaintiff's privilege, in case the bar has become complete, pending litigation; it therefore does not prevent a second suit, after reversal, though not instituted within a year, if the general statute had not run; such provision cannot be made the subject of a *plea*; the defendant can only plead the *general statute*, when the plaintiff may reply that he sued within six years, and his judgment was reversed, and he sued again within one year after the reversal. *Lang v. Fatheree*, 7 S. & M. 404.

M.

MALICIOUS PROSECUTION.

See *Instruction*, 3; how far court can instruct jury there was a want of probable cause.

MANDAMUS.

1. The supreme court has power

to grant a mandamus. *Ex parte Robson*, Walk. 412.

2. The circuit court will, by mandamus, compel the county court to settle and allow all claims against the county, and to levy a tax for their liquidation, if it refuse. *Madison Court v. Alexander*, Walk. 523.

3. An application for a writ of *mandamus*, is addressed to the sound legal discretion of the court, and will not be awarded to enforce the performance of an act, which is contrary to law; where, therefore, by law, the tax-collector was required to pay all moneys, by him collected, into the state and county treasuries; an order of the board of police to a tax-collector, to pay the taxes collected to a particular person, not the county treasurer, is without authority of law, and a *mandamus* should not be issued to compel the tax-collector to obey it. *Ross v. Lane*, 3 S. & M. 695.

4. Where a *mandamus* was issued by the circuit court to a tax-collector, to collect a certain tax, and he appealed, and pending the appeal, his term of office expired: *held*, that the high court would not grant a *mandamus* against his successor. *Ib.*

5. Whether a *mandamus* is the appropriate remedy to compel a sheriff to make a deed to property which he has sold? *Davis v. Pryor*, 6 S. & M. 114.

MECHANICS' LIEN.

1. When, under the law of 1821, the contract between a mechanic and his employer is reduced to writing, and filed in the clerk's office of the county, within three months from its making, the mechanic will have a lien on the building contracted for, even as against a purchaser of the property, who had no actual knowledge of the existence of the lien; and when the legal title to the property was not in the employer, the law favors the claim of the mechanic. *Buck v. Brian*, 2 How. 874.

2. The mechanics' lien law of 1840, which provides, that where a mechanic is seeking to enforce his claim, under the statute, he shall file his petition in the circuit court, setting out the facts of the case, and describing the property on which the lien is claimed; that the petition shall be docketed on the common law appearance docket, and the court shall be governed by the same rules of evidence that are observed in suits at law, and, upon judgment in favor of the plaintiff, the execution shall issue, describing the property to be sold on which the lien attached, is not unconstitutional; it does not confer equitable jurisdiction on the circuit courts, but is throughout a *legal* remedy; and the sale, under the execution of the property described in the petition, will relate back to the commencement of the lien under the contract; it is a common law-suit; is to be tried by a jury, and their verdict for the plaintiff will be construed to be an allegation that the statements in the petition are established as true. *Richardson v. Warwick*, 7 How. 131. And it is not necessary to the validity of a mechanic's lien, under this law, that the contract for labor and materials should be in writing; the lien will hold on a parol contract, if the suit be brought in proper time. *Harrison v. Breeden*, 7 How. 670. The act relates only to contracts made subsequent to its passage. The law of 1838 will be in force as to contracts prior thereto. *Andrews v. Washburn*, 3 S. & M. 109.

3. In such case, the mechanic may, if he see proper, take out execution generally, to be levied on any property of the defendant, in which event he waives his special lien. *Ib.*

4. Under the statute of Feb. 15, 1838, a bill in chancery will be sustained, to enforce the mechanics' lien, where a judgment at law has been obtained, and the bill avers the performance of the work according to the contract, the institution of the suit within the prescribed time, and the rendition of the judgment. *Andrews v. Washburn*, 3 S. & M. 109.

5. In a suit at law, by petition, under the mechanics' lien law, to subject alleged property of the defendant to the payment of an alleged mechanic's lien in favor of the plaintiff, if the defendant be a non-resident, it is error to grant an order of publication against him, and on proof thereof to render a judgment by default; such judgment will be absolutely void for want of due notice. *Falconer v. Frazier*, 7 S. & M. 235.

6. Where a petition, under the mechanics' lien law, was filed against two persons, one of whom plead and the other made default, and judgment by default was rendered against the latter at one term, and judgment on the issue, at the next term, for a less sum, was rendered against the other, it was held to be erroneous; as the plaintiff could not have, in the same suit, two distinct judgments for different sums. *Ib.*

7. In a petition, under the mechanics' lien law, the title to the property sought to be subjected to the lien cannot be brought in issue; an issue, therefore, tendered by the defendant to such a petition, that he was neither proprietor nor lessor of the premises, will be an immaterial one; nothing is affected by the judgment on such petition but the interest of the party to the record; if he have no interest, the

judgment will confer no lien; the lien will be confined to the actual interest; the rights of third persons, not parties to the suit, will remain as they were previously. *Ib.*

8. See *Guardian and Ward*, 13; the land of ward cannot be subjected to mechanics' lien for building erected thereon by guardian.

MERGER.

Merger is the operation of law, by which a greater and a less estate coincide and meet in the same person, without any intermediate estate, it pre-supposes the prior existence of the lesser estate; where, therefore, B., by his will, left certain slaves to his daughter for life, and after her death to revert to the gross estate, and be disposed of according to that, and the will made no disposition of the gross estate; held, that the life estate of the daughter would not merge in her claim as heir, but that she would take only a life estate, and her children, living at the time, on her death, would be remaindermen. *Magruder v. Stewart*, 4 How. 204.

MORTGAGE.

1. An equity of redemption in land and personalty, is subject to sale, on an execution upon judgment, in this state; but the interest of the mortgagee is not. *Hunter v. Hunter*, Walk. 194. *Sed aliter*, as to personalty. See *Thornhill v. Gilmer*, 4 S. & M. 153.

2. How far widow dowable in equity of redemption. See *Dower*, 4, 8:

3. A subsequent mortgage, duly recorded, without notice to mortgagee, of a prior one, unrecorded, will take precedence of it. *Pomet v. Scranton*, Walk. 406.

4. The mortgagor of slaves is not liable for hire, on forfeiture of the condition of the mortgage. *Turnbull v. Middleton*, Walk. 413.

5. The issue of such slaves are not subject to the lien of the mortgage. *Ib.*

6. A., holding a mortgage of B., and filing a bill to foreclose it, cannot be defeated by B.'s showing that A. promised, from benevolent feelings towards B., without any consideration, to buy certain property, at sheriff's sale, of B., and permit B. to redeem it at a fixed price, and that A. had thus bought B.'s property; and, upon the price agreed upon being put upon it, the mortgaged debt would be extinguished in part. *Mercer v. Stark*, Walk. 451.

7. Where A. sells land to B., and B. mortgages the land to A. to secure the purchase-money, B.'s wife is not entitled to dower as against A., and those claiming under him, but is as to the rest of the world. See *Dower*, 8.

8. See *Trust*, 6; for mortgage with power of sale by trustee.

9. A decree, on foreclosure of mortgage, ordering execution for any balance not satisfied by the sale, is erroneous; the remedy for such balance is at law. *Stark v. Mercer*, 3 How. 377.

10. An absolute bill of sale, with a condition written underneath it, that it should be void on the payment of a sum certain, on a day named, is but a mortgage. *Kent v. Allbritain*, 4 How. 317.

11. And if an additional sum be loaned on the faith of the same bill

of sale, and further time given to redeem, those facts may be shown by parol. *Ib.*

12. Where a bill is filed to redeem a mortgage, and the defendant answers that he has bought the equity of redemption, being matter in avoidance he must prove it fully. *Ib.*

13. Where a mortgage on a slave was given, and the slave delivered to the mortgagee, he will be held accountable for the hire, to be credited on the mortgage debt. *Ib.*

14. A bill to redeem mortgaged property must contain an offer to pay the mortgage-money; but a prayer for an account will be a sufficient offer; therefore, in a bill to redeem a mortgaged slave, an allegation by the mortgagor, of a tender of the mortgage-money, before it was due, and a refusal to receive it on the ground that the mortgage-property was not held by virtue of a mortgage, but of an absolute bill of sale, accompanied with a prayer for the redelivery of the slave, and an account for its hire, is a sufficient offer to redeem. *Edgerton v. McRea*, 5 How. 183.

15. Where a mortgage was executed to secure the payment of money due by instalments, and, after all the notes had fallen due, a bill was filed to foreclose, the court ordered that the proceeds of the mortgage should be applied to the notes *pro rata*, and refused to direct an application of the money to the first note, though it was secured by an accommodation indorser for the mortgagor. *Parker v. Mercer*, 6 How. 320. So, also, the proceeds of property secured by deed of trust, must be applied ratably to the different notes. *Cage v. Iler*, 5 S. & M. 410.

16. If the payment of a note be

secured by mortgage, and the note be barred by the act of limitations, and the mortgage not, the party may pursue his remedy on the mortgage, which is not barred. *Miller v. Helm*, 2 S. & M. 687; *Miller v. Trustees of Jefferson College*, 5 S. & M. 651; *Trustees of Jefferson College v. Dickson*, Freem. Ch. 474.

17. A mortgage, duly recorded, is constructive notice to every body; therefore, the statute requiring presentation of all claims to the administrator, within a given time after publication, or they will be barred, does not apply to notes secured by mortgage, as they are always in a state of presentation. *Ib.*

18. See *Chancery*, 138, for power to aid, by superior court of chancery, foreclosure of mortgage in circuit court.

19. The legal effect and operation of a mortgage of personal property, after the condition is forfeited, is to invest the mortgagee with an absolute ownership in the property mortgaged. *Thornhill v. Gilmer*, 4 S. & M. 153.

20. See *Fraud*, &c. 31; possession by mortgage, not fraudulent.

21. The assignment of a note, secured by mortgage, carries the benefit of the mortgage along with it to the assignee. *Terry v. Woods*, 6 S. & M. 139.

22. Where the assignee of one of a series of notes, all secured by mortgage, sues the debtor at law, and arrests him upon mesne process, and afterward, from the inability of the debtor to give bail, and out of clemency, discharges him from the arrest, the mortgage lien of such assigned note will not thereby be divested, or taken away; it seems it would be otherwise, if the

discharge were upon an arrest on final process. *Ib.*

23. Where the holder of one of a series of notes, secured by mortgage, upon the arrest on mesne process of the judgment-debtor, discharges the debtor from the arrest, and at the same time receives a steamboat from him as collateral security, which he afterwards exchanges with the debtor for notes, also as collateral, which prove worthless; the holder of the assigned note does not thereby discharge the lien of the mortgage as to the note so held by him. *Ib.*

24. Where a decree was rendered, at the suit of the holder of one of a series of mortgaged notes, against the mortgage-debtor, subjecting the property mortgaged to the payment of the mortgaged debt, and in neither the pleadings nor proof, did it appear that the mortgaged property was an inadequate security for all the mortgaged debts; held, that, at the mere suggestion of counsel, that such might be the case, the decree would not be reversed. *Ib.*

25. Where the holder of one of a series of mortgaged notes indorses it to a third person, before due, and after its maturity and non-payment takes it up, and becomes again the holder thereof, he will not thereby lose his recourse upon the mortgaged premises, but will be substituted again to his original rights. *Ib.*

26. See *Infants*, 3. Infant cannot redeem mortgaged premises sold under decree.

27. Where A. agrees to make a security in future, that is in equity an equitable mortgage; but whenever a mortgage is executed, according to the agreement of the parties, that is a merger of the

equitable mortgage. *Petrie v. Wright*, 6 S. & M. 647.

28. P. gave a mortgage to a railroad company, as a security for the performance of certain work, and the chancellor rendered a decree of foreclosure of the mortgage, for a balance found to be due by P. to the company, on an account stated between them; *held*, the mortgage being a mere security for the performance of work, and not for the payment of a debt, the decree was erroneous. *Ib.*

29. See *Circuit Court*, 14 - 16; for jurisdiction and proceedings therein to foreclose mortgage.

30. It is necessary that a sale of mortgaged premises, made by a commissioner under a decree of foreclosure, should be confirmed by the court. *Dowell v. Sanders*, 7 S. & M. 206.

31. C. conveyed two negroes to B., by a bill of sale, absolute and unconditional upon its face; *held*, that it was competent for C. to prove by parol that the bill of sale was intended as a mere mortgage to secure B. a sum of money. *Craft v. Bullard*, 1 S. & M. Ch. 366.

32. The only relief a court of equity can grant a mortgagor upon his mortgage, is to allow him to redeem his mortgaged property, upon a bill shaped for that purpose. *Ib.*

33. C. filed his bill against B., alleging that B. had obtained a judgment at law upon a note, to secure the payment of which he had conveyed to B. two negroes, and averring that B. had been in possession of one ever since the sale, and praying for an account of his hire and his value, and for an injunction against the judgment at law, but *not* offering to redeem;

held, that the injunction could not be granted. *Ib.*

34. A mortgagor has no right to force the mortgagee to take the property at an assessed value, and cannot call for an account, upon any such principle. *Ib.*

35. A mortgagee who sells a portion of the mortgaged property, must account for the value of the property sold, and if slaves, for their hire. *Ib.*

36. The interest of a mere mortgagee, is in the nature of a *chose in action*, and cannot, therefore, be seized and sold under execution at law. *Boisgerard v. Wall*, 1 S. & M. Ch. 404.

37. See *Partners*, 42-45, for construction of mortgage given by each partner to the partnership to secure the partnership debts.

38. See *Judgment*, 138; mortgage takes date of lien from *registration*.

39. See *Partners*, 43; surviving partner only proper party to foreclose mortgage to partnership.

40. R., holding a mortgage on T.'s property, agreed to receive some money, and take the property back, in discharge of the mortgage; T. paid the money, but refused to deliver the property; *held*, that the mortgage was not discharged by the agreement. *Robinson v. Thompson*, 1 S. & M. Ch. 454.

41. R. being surety to A. R., for T., was indemnified by a mortgage on T.'s property, and filed his bill to foreclose the mortgage, and be discharged from his suretyship; *held*, that it was no answer to this bill that T. had been garnisheed at law as a debtor of A. R., and that the garnishment was still pending. *Ib.*

42. The insolvency of the estate

of the deceased mortgagor does not suspend the action of the chancery court, in foreclosing the mortgage, and decreeing a sale of the mortgaged premises. *Cannon v. Kinney*, 1 S. & M. Ch. 555.

43. A mortgagee, to whom property has been conveyed by mortgage, with a power of sale, cannot sell, without application to a court of equity. *Ford v. Russell*, Freem. Ch. 42.

44. A mortgage can only be discharged by a reconveyance or an absolute payment, or satisfaction of the mortgage-money; the substitution of new notes, or securities, even of third persons, for the one

recited in the mortgage, will not impair the lien of the mortgage for the payment of such substituted notes, unless the mortgagee be proved, by pretty clear and positive testimony, to have waived or abandoned the lien. *Heard v. Evans*, Freem. Ch. 79.

45. See *Fraud*, 45; whether mortgagee from fraudulent grantee protected, *quare*?

46. An equity of redemption in personal property, is not subject to seizure and sale, under an execution at law. *Valentine v. Planters Bank*, Freem. Ch. 727.

See *Chancery*, tit. *Mortgage*.

N.

NATCHEZ, CITY OF.

1. See *Justice of Peace*, 5, as to power to grant distress warrant in city of Natchez.

2. The city of Natchez is a port of entry; and a note payable to it, for port duties to be collected, is an illegal contract, being prohibited by the act of congress, admitting the state of Mississippi into the Union. *Natchez v. Trimble*, Walk. 376.

NEW TRIAL.

1. A witness, subpoenaed for the prosecution, voluntarily withdraw-

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ing himself during the trial, before he is examined by the state, will not be ground for new trial for the defendant. If he desired his testimony he should have subpoenaed him. *State v. Blennerhassett*, Walk. 7.

2. In a criminal prosecution, if the jury assess fine, the court will not grant a new trial, unless the fine be so excessive as to evince partiality or corruption in the jury. *Ib.*

3. That counsel did not press the examination of a witness unwilling to testify, lest the court should commit him for contempt, is no ground for new trial. *Hinds v. Terry*, Walk. 80.

4. Nor is the suggestion of the discovery of new and material evidence, since the trial, unless the truth of the suggestion be fully established. *Ib.*

5. If it is manifest to a reasonable certainty that justice has not been done, the court will grant new trial. *Taylor v. Sorsby*, Walk. 97.

6. It is an evident mistake in point of law, for the jury to take out a deposition not read on the trial, and constitutes a strong reason for granting a new trial. *Ib.*; *aliter*, if the paper taken out by the jury be rejected instructions, asked for and refused, it not appearing that the paper was considered by the jury. *Goode v. Linecum*, 1 How. 281.

7. When the jurors depart from the bar, should they doubt as to the testimony given them, they may hear one of the witnesses again, so it be in open court, and in the same manner propound any question to the court, but this cannot be done, except in open court; and if the jury examine a witness sworn on the trial, otherwise than in court, though he only repeat the same testimony which he gave on the trial, the verdict will be set aside. *Offit v. Vick*, Walk. 99.

8. It is unlawful for the jury to separate before they return their verdict, nor will it be any excuse that a sworn constable attended the juror when he separated from his fellows, unless he did so under the permission of the court. *Ib.*

9. At common law, the jury could take out no evidence, except certain writings under seal, unless by consent of the parties; and though a statute of this state permits the jury to take out papers, read in evidence on the trial though not under seal, the court will not

relax the rules of the common law beyond the provisions of the statute, and therefore it will be error for the jury to take out a paper not read in evidence by either party. *Ib.*

10. Where a complainant, in a bill for a new trial at law, appears to have had a good defence, which he was prevented from making, or moving for a continuance or new trial, by accident, unmixed with negligence, he will be allowed a new trial. *Ford v. Ford*, Walk. 505.

11. The grant of a new trial being in the discretion of the court, it ought not to be allowed for excess in the verdict, where the plaintiff remits the excess complained of. *Young v. Englehard*, 1 How. 19; *Green v. Robinson*, 3 How. 105; *Hurd v. Germany*, 7 How. 675.

12. See *Evidence*, 58; when new trial granted, for newly discovered testimony.

13. The court refused to grant a new trial where a statute passed since the judgment, would cure the defect on another trial. *Lyons v. Jackson*, 1 How. 474.

14. A new trial at law will not be granted on the ground of newly discovered evidence, unless it be shown that it has come to the knowledge of the party since the trial; that his failure to discover it sooner was not owing to the want of due diligence, and that it would probably produce a different result; and in such case the party applying for the new trial, must exhibit the affidavit of the witness, of what he can prove, or account for its non-production. *Hare v. Sproul*, 2 How. 772; *Rulon v. Lintob*, 2 How. 891.

15. See *Juror*, 20; when new trial granted for conduct of juror.

16. A new trial will not be granted where the failure to make the defence on the first trial was owing to negligence and inattention of the party or of his counsel; if the other party has been guilty of no fraud; if, therefore, an attorney file a plea which does not cover his client's defence, it will be no ground of new trial. *Green v. Robinson*, 3 How. 105.

17. Where the attorney for the defendant, having been informed of the nature of his client's defence, neglects to file the proper pleas to enable him to make it, and when the case is called for trial asks to withdraw the plea, and on that being refused, asks to amend it, and on that being refused, a verdict is rendered, a new trial will not be granted on the affidavit of the defendant, that he had a meritorious defence, setting out its nature. *Ib.*

18. A new trial will not be granted, though the verdict be against the weight of testimony; as where in an action of trespass for killing a mule, there was some evidence to support the defence set up, and the jury found for the defendant, the court refused to disturb the verdict, although they said that, upon the evidence, the jury should have found for the plaintiff. *Dickson v. Parker*, 3 How. 219; *Harris v. Halliday*, 4 How. 338.

19. A verdict which is unjust in giving excessive damages will be set aside; as where an action was brought for breach of warranty of soundness of two out of three negroes, for which \$2500 were given; when it turned out in proof, one was diseased with small-pox, and one was idiotic and the other sound; but it did not appear that the one diseased with small-pox,

died, and the jury found damages \$2200; *held*, that the verdict was too large, and a new trial should be granted. *Ingraham v. Russell*, 3 How. 304.

20. A new trial will not be granted, unless the verdict be unwarranted by the testimony; where therefore A., contracted to do a piece of work for B., and having done it, sued for the price, and proved that B. was often present while the work was going on, and knew the materials to be bad, and that a good job could not be made of them, and B. after the work was done, permitted it to be exposed to injury, whereby it might have become defaced, a verdict in favor of A. will not be disturbed, though B. prove the materials to be bad, and the work to have been badly done and worthless. *Collins v. Money*, 4 How. 11; see *Harris v. Halliday*, 4 How. 338.

21. A new trial will not be granted on the ground of newly discovered evidence, where the testimony might have been had, or its place supplied, previous to trial; where, therefore, a deed, to which there was a subscribing witness, was excluded as evidence, for want of due proof of execution, the affidavit of the party, that, since the trial, he had discovered that the subscribing witness was living, though formerly supposed dead, was not sufficient to obtain a new trial, because it did not appear that proper diligence had been used, at the trial, to prove the subscribing witnesses' hand-writing. *Bledsoe v. Little*, 4 How. 13.

22. A new trial will not be granted because testimony was admitted before the jury, the relevancy of which is not made apparent by the record; where a new trial is

refused, *all the testimony* must be embodied in the record; and where all is not in the record, the propriety of admitting the part set forth will be presumed. *Prussel v. Knowles*, 4 How. 90; *semble Leach v. Lebusan*, 2 How. 908. Exceptions on the decision of a motion for a new trial must embody the substance of *all the testimony*, that the court above may consider the whole case, and decide as the circuit court should have done. *Philips v. Lane*, 4 How. 122.

23. A new trial will not be allowed on account of the introduction of improper testimony, where it was not objected to when introduced. *Ib.*

24. See *Criminal Law*, 99; person not sworn, going into jury-room, ground of new trial.

25. New trial not granted, if verdict correct, merely because the instructions were erroneous, unless correct instructions would have changed the result. *Hill v. Calvin*, 4 How. 231.

26. Where a bill of exceptions is taken to the refusal to grant a new trial, and the evidence is embodied, the court will presume that the substance of all the testimony, as required by the statute, has been inserted. *Pickett v. Ford*, 4 How. 246.

27. A court of chancery will grant a new trial at law, where the defendant has a good defence at law, but has been prevented from making it by fraud or accident, unmixed with any fault or negligence on his part; where, therefore, a defendant, in a judgment at law, applied to a court of equity for a new trial, on the ground that he was absent from the state when the writ in the suit at law was served, which was returned by the sheriff

to have been by leaving a copy at the defendant's residence, and that he never had any actual notice of the suit, and had paid part of the bill sued on; *held*, that he was entitled to a new trial, and an injunction against the judgment at law. *Jones v. Commercial Bank of Columbus*, 5 How. 43. But it is no ground for a new trial, that the complainant's attorney was ill at the time, and could not make the defence at law. He should have been there himself. *Yeizerv. Burke*, 3 S. & M. 439.

28. A new trial will not be granted for an erroneous instruction of the judge, where justice has been done, and it is not likely a different result will ensue on a different trial. *Perry v. Clarke*, 5 How. 495.

29. When the regular term of the court failed, and the defendant, being out of the county, had no actual notice of the special term at which his cause was tried, and, in consequence thereof, failed to make defence, a court of chancery will, on allegation of merits, award a new trial. *Joslin v. Coffin*, 5 How. 539.

30. See *Criminal Law*, 92; what showing insufficient to obtain new trial on account of absence of a bill of sale, conferring title to the property stolen, in the prisoner.

31. After two mis-trials, and a verdict on the third trial, for the defendant, in an action for a breach of warranty of a negro, where the proof was, as contained in the record, favorable to a recovery by the plaintiff, the court refused to grant a new trial, inasmuch as it did not appear that another trial was likely to change the result. *Philbrick v. Holloway*, 6 How. 91.

32. Where a verdict had been

rendered for the plaintiff in execution, on a trial of right of property, and a new trial granted, and exceptions taken thereto, embodying the evidence, and, upon a second trial, the jury found the other way; if the first verdict was correct, the court will set aside the last, and establish the first verdict. *Ross v. Garey*, 7 How. 47.

33. Where the court takes a motion for a new trial, under advisement, to deliver an opinion in vacation, as allowed by statute, there must be a minute thereof made on the record, or the judgment will not be suspended. *Ib.*

34. Affidavits for new trials are not parts of the record, unless made so by bills of exception. *Ib.*

35. The statute, which declares that no more than two new trials shall be granted to the same party, does not prohibit a new trial where there have been two verdicts against the same party, but where there have been two new trials granted. *Stamps v. Bush*, 7 How. 255.

36. Where bill of exceptions is signed to the refusal to grant a new trial, and the evidence is embodied in the bill, this court will presume it to contain all the evidence, though the bill does not expressly so assert. *Ib.*

37. A new trial will not be granted where the verdict is according to the justice of the case, because the judge mis-directed the jury, as to the weight of record testimony, when there was ample other testimony adduced to the same point. *Cartwright v. Carpenter*, 7 How. 328.

38. Where a variety of testimony is submitted to the jury, and no instruction asked of the court, or question of law raised, a new

trial will not be granted, unless the preponderance of evidence against the verdict is very great. *Kellogg v. Budlong*, 7 How. 340.

39. A new trial will not be granted on account of newly discovered testimony, when it is merely cumulative. See *Evidence*, 119; for a description of what is cumulative evidence. *Vardeman v. Byrne*, 7 How. 365.

40. Where an answer to a bill of discovery had been on file for three months, the plaintiff could not be legally surprised at its production on the trial, and would not be, therefore, entitled to a new trial on that ground. *Robinson v. Francis*, 7 How. 458.

41. The statute which authorizes either party to except to the grant of a new trial must operate mutually, as well for the party against whom the new trial was granted, as the one against whom it might be improperly refused; where, therefore, a verdict, obviously right on the evidence, was set aside, and exceptions were filed to it, and on the next trial a verdict and judgment in favor of the other party were granted, the last verdict and judgment will be set aside, and the first made to stand. *Moore v. Ayres*, 5 S. & M. 310. A different course might perhaps be pursued, if the last verdict were rendered on the same testimony with the first. *Wood v. The Am. Life Ins. and Trust Co.*, 7 How. 609. Yet, where a new trial has been granted and excepted to, a writ of error or appeal therefrom cannot be granted until the termination of the second trial, and judgment therein. *Bank of Lexington v. Taylor*, 2 S. & M. 27. The grant of a new trial is not a final judgment from which an ap-

peal or writ of error will lie. *Terry v. Robins*, 5 S. & M. 291.

42. A court of equity will grant a new trial at law, where the judgment was obtained by fraud; but the fraud must be clearly established, and it must appear that the plaintiff was guilty of no laches; where, therefore, a defendant at law filed a bill for a new trial, on the ground that the plaintiff at law had promised to dismiss the suit, and therefore he had not attended to it, and the defendant failed to establish, by proof, the promise to dismiss the suit, he will not be entitled to relief. *Land v. Elliot*, 1 S. & M. 608.

43. Where improper testimony has been admitted, if there be also sufficient legal testimony to justify the verdict, without regard to that which is exceptionable, and it is clear that justice has been done, and there is little reason to believe a different result would ensue upon a second trial, a new trial will not be granted; in a doubtful case, the rule would be different. *Barringer v. Nesbit*, 1 S. & M. 22.

44. A new trial will not be granted, when it appears that the jury found according to the weight of the evidence. *Jenkins v. Whitehead*, 1 S. & M. 157. But where there is no evidence whatever to sustain the verdict, it will be set aside. *Crockett v. Young*, 1 S. & M. 241. Yet the verdict will not be set aside, unless it is a *very clear case* that justice has not been done. *Leflore v. Justice*, 1 S. & M. 381. And if the jury find according to the weight of evidence and the law, even though opposed to the charge of the court, a new trial will not be granted. *Van Vacter v. Brewster*, 1 S. & M. 400. If, however, the verdict be against law and evi-

dence, the high court will grant a new trial, though refused below. *Tunstall v. Walker*, 2 S. & M. 638. They will not, however, disturb the verdict, unless a great preponderance of testimony appear against it; where, therefore, S., being an attorney at law, was employed as such by E. to defend certain suits, specified in a list, then pending against E., and, for a fee in which, E. gave S. his note; and S. afterward agreed to defend E., without charge, in all other suits against him at that term; there was a suit then pending against E., in a branch of which S., at a subsequent term, took a fee against E.; and in an action on the note for the fee, agreed to be paid by E., he set up a failure of consideration, because S. had subsequently taken a fee against him; it did not appear in proof, whether the suit in which S. became afterwards engaged against E. was one of those embraced in the list or not; the jury found for S., and it was *held*, that their verdict should not be disturbed. *Ellzey v. Stone*, 5 S. & M. 21.

45. A party, having had two new trials in the same case, is not entitled, under the statute, to a third new trial; whether the statute would prevent a third new trial, where the verdicts were obtained by misdirection of the court, may be questioned, but it will do so where the finding was on the testimony alone. *Munn v. Perkins*, 1 S. & M. 412.

46. A motion for a new trial may, by a special order, be continued from one term of the court to the next; without such special order, it would expire with the term. *Kane v. Burrus*, 2 S. & M. 313.

47. Where a judgment was rendered on a note, in favor of the administrator of a deceased person, and the maker filed the affidavits of witnesses, that they had heard the intestate acknowledge the payment of nine hundred dollars on the note, and also filed his own affidavit that the evidence had come to his knowledge since the trial, and he had used due diligence to discover it; *held*, that the defendant was entitled to a new trial. *Ib.*

48. Where a witness, when on the stand, from inadvertence, and because his attention was not called to the circumstance, does not disclose all his information of the merits of the case, it is not a sufficient ground for the party, whom the undisclosed information will benefit, to obtain a new trial upon. *Houston v. Smith*, 2 S. & M. 597. Not even if the witness omitted to testify of a payment which he afterwards remembered. *Davis v. Presler*, 5 S. & M. 459.

49. T. R. & Co. recovered a judgment against J., who moved for a new trial, which was granted him upon his paying the costs of suit within 90 days; *held*, that defendant was entitled absolutely to a new trial; the payment of the costs was not a condition precedent; he was entitled to it whether he paid the costs or not; and if he failed to pay, the opposite party must resort to the legal remedy to coerce it. *Johnson v. Taylor*, 3 S. & M. 92.

50. A new trial will not be granted because improper testimony was permitted to go to the jury, where there was ample competent testimony on the same point; as where, in an action on a lost note, the plaintiff's affidavit of its loss was permitted to be read to the

jury, as evidence of the contents of the note, when there was also ample other evidence of its contents. *Davis v. Black*, 5 S. & M. 226. So; also, where the memorandum-book of the sheriff was improperly admitted in an action by the sheriff to recover the price of real estate sold by him, when the verdict was sufficiently supported by other evidence. *Hand v. Grant*, 5 S. & M. 508.

51. Where, in an action upon an open account, the plaintiff, after service of process on the defendant, and plea of general issue, obtained leave to amend his declaration, and under the amended declaration, filed a new account, differing in the items, in their dates, and in the sum total, from that filed in the original declaration, upon which new account, judgment was obtained against the defendant, who filed his bill for a new trial on the ground of fraud in the plaintiff, in filing the changed account; *held*, that fraud could not be committed by filing a new account and declaration where there was leave granted, and a previous service of process. *Davis v. Presler*, 5 S. & M. 459.

52. If a defendant, after service of process and plea by him, see proper to absent himself from the state during the pendency of the action and thus place it out of his power to be informed of the progress of the case, he does so at his peril, and can claim no exemption from the consequences. *Ib.*

53. The statute, which allows exceptions to the action of the circuit court in granting new trials, makes it the duty of the high court of errors and appeals to revise the judgment of the circuit court, and do what that court should have

done; where, therefore, the declaration against the indorsee of a note did not aver demand and notice to the indorser, but as an excuse therefor, averred the insolvency of the maker; and on the defendant's plea of non-assumpsit, without any charge of the court, the insolvency being proved, a verdict was rendered for the plaintiff; and the defendant moved for a new trial, which being refused, he embodied the evidence in a bill of exceptions, and brought the case to the high court; *held*, that the statute of jeofails did not preclude the court from examining the case and granting a new trial for want of evidence to uphold the verdict. *Reaves v. Dennis*, 6 S. & M. 89.

54. Where a case has been submitted to a jury, and they have retired to consider of their verdict, it will be error for the court, without the consent of the parties, to explain, at the request of the jury, a matter of law to them, bearing upon the case, upon which they notified him they had doubts. *Taylor v. Manley*, 6 S. & M. 305.

55. See *Evidence*, 193; the exclusion of a deposition because the name of the commissioner was blank when the commission issued not ground for new trial.

56. It is not ground, in equity, for a new trial at law, where a party, having a good defence, has failed to make it, that the grounds of his defence were not known to him at the time of the trial at law; it must also be averred; that knowledge of them could not have been obtained by the use of ordinary diligence; where, therefore, L. filed his bill to be relieved against a judgment at law, recovered against him by M., and alleged that he was in partnership with C. in erecting a

saw-mill; that a settlement and dissolution of the firm took place, and C. agreed to pay all the debts, the debt to M. being one of them; that the note on which the judgment was recovered was executed after the settlement, but antedated, and the signature of the firm of L. & C. made without L.'s authority, and that L. had no knowledge of these facts until after the judgment at law; *held*, that L. showed no ground for relief. *Leggett v. Morris*, 6 S. & M. 723.

57. Where the charge of the court is in accordance with the law, yet the jury find contrary thereto, and to the testimony, and the circuit court refuse the new trial, the high court of errors and appeals will interpose and grant it. *Garvin v. Lowry*, 7 S. & M. 24.

58. To entitle the party to a new trial on the ground of surprise, he must show merits, and the surprise must be of such a character as care and prudence could not provide against; the slightest negligence will defeat the application for a new trial, or occasion the imposition of the most rigorous terms; where, therefore, a suit was brought in May, 1841, and a trial had, and judgment rendered in November, 1843, against all the parties, and there was nothing in the record to impeach the correctness of the verdict, except that one of the defendants filed an affidavit for a new trial, alleging that on the day before the trial it was agreed between the plaintiff and himself, that the case should not be tried until they could make an effort to compromise it, and that relying on the agreement he went home and returned the next day, and found the case in progress of trial; and that the agreement to compromise and

let the case stand over had prevented his applying for leave to plead his discharge in bankruptcy since the institution of the suit; *held*, that the discharge as a bankrupt was not a meritorious defence; the application to plead it should have been made earlier, and the new trial refused. *Thompson v. Williams*, 7 S. & M. 270.

59. It is a sufficient excuse for not making a defence at law, that the defendant was prevented by high water from attendance at the court—the creeks being so swollen that he could not cross them. *Brooks v. Whitson*, 7 S. & M. 513.

See *Chancery*, tit. *New Trial*.

NON-RESIDENT.

1. A non-resident, being sued in a state court for a sum exceeding five hundred dollars, is entitled, under the act of congress, on the performance of the necessary requirements, to have the suit transferred to the next term of the United States circuit court, for the district where he is sued, and, on proper application to the state court, it will be error to that court to refuse the transfer; nor will it make any difference if such non-resident be sued as executor; and if the United States court and the state court wherein such non-resident is sued, commence their sessions on the same day, a fair construction of the act of congress, will give the non-resident the right to have the transfer made and returned to the next succeeding term of the court. *Hill v. Henderson*, 6 S. & M. 351.

2. See *Chancery*, 249; affidavit for publication for non-residents, must state their *non-residence*;

citizenship in another state will not do.

3. See *Chancery*, 197; a court of, no jurisdiction against single non-resident, not served with process, nor proceeded against *in rem*.

4. A non-resident who sends slaves to this state for sale, cannot recover of his agent the proceeds of their sale received by him; their introduction into the state was in violation of law. If the contract of a foreigner is to be completed in, or has reference to its execution in a foreign country, and is repugnant to the laws of that country, he is bound by them. *Wooten v. Miller*, 7 S. & M. 380.

NONSUIT.

1. The mere fact that in an action for use and occupation, where the sum claimed was an hundred dollars, the jury found a verdict for a less sum than the court had jurisdiction of; will not entitle the plaintiff to a nonsuit after verdict, under the statute, unless it also appear that he demanded a greater sum, in order to evade the operation of the statute, which entitled the defendant to a nonsuit, when sued for a less sum than the court had jurisdiction of. *Wilson v. Owens*, 1 How. 126.

2. A writ of error will not lie from a voluntary nonsuit; nor do the courts in this state possess the power to compel a party to a nonsuit. *Ewing v. Glidwell*, 3 How. 332; *Copeland v. Mears*, 2 S. & M. 519; nor will the writ lie where the party suffers a nonsuit, with leave to move to set it aside during the term, and the court subsequently refuses to set it aside.

Thornton v. Demoss, 5 S. & M. 609.

3. It is error, at the return term of the writ, in an action in the circuit court, to nonsuit the plaintiff for failing to reply to the special pleas of the defendant; if, however, at the succeeding term, the plaintiff fails to perfect the pleadings *instantly*, the court may then enter judgment of *nonsuit* against him. *Kain v. May*, 5 S. & M. 368.

NOTICE.

1. A purchaser is presumed to have notice of every defect disclosed by any recital in any deed, essential to his title, and in order to protect himself in equity as a purchaser without notice, that fact must be averred in the bill. *Chew v. Calvert*, Walk. 54.

2. Persons standing by in silence when a sale of their property takes place, are not deprived of their rights, if the purchaser had notice, otherwise, of them. *Ib.*

3. In judicial proceedings where constructive is substituted for actual notice, it rests upon the party who seeks a benefit from such proceedings, to show that such constructive notice has been given. *Moore v. Cason*, 1 How. 53; see *Guardian and Ward*, 3, 4; *Gwin v. McCarroll*, 1 S. & M. 351; *Campbell v. Brown*, 6 How. 106; *Ib.* 230.

4. See *Deed*, 25, and *Possession*. Possession, notice of unrecorded deed, and title of occupant and creditors affected thereby.

5. See *Deeds*, 26, 27; mortgage and deed of personalty must be recorded in the county where the property is removed to.

6. See *Vendor and Vendee*; the

vendor's equitable lien, passes with land to those who have notice.

7. See *Judgment*. Cannot be corrected after term, without notice.

8. See *Process*, for sufficient return of service.

9. See *Sheriff*. Return of cannot be amended without notice.

10. See *Set-Off*, 21; as to how far publication, in attachment of another state, notice of transfer of the claim attached.

11. A mortgage duly recorded, is notice of its contents, and if the notes secured by it be misdescribed as to their periods of maturity it will still be notice to a judgment creditor of the mortgagor since the mortgage, of the true description of the notes, and affect him with a knowledge thereof, and if he buy the land under his execution, he will acquire but the defendant's equity of redemption. *Rollins v. Callender*, Freem. Ch. 295.

NUISANCE.

1. A party owning a lot in a large city, cannot be enjoined "from building a house on his own ground," on the plea that it obstructs the light and air of his neighbor; the right to the enjoyment of an unrestricted circulation of air, can hardly be said to belong to the citizen of a large town. *Gwin v. Melmoth*, Freem. Ch. 505.

2. Where a bill enjoining a man from erecting a chimney on his lot, because it endangered the complainant's house from fire therefrom, alleged "that the top of the chimney would be in a few feet of the complainant's kitchen, and

sparks of fire from it would easily communicate to the house ;” but it did not appear that the complainant could not guard himself by a fire-proof roof, nor that the danger was direct, immediate and imminent ; *held*, that the injunction should be discharged ; as courts of chancery never interfere in cases of nuisance, unless the complainant’s rights are clear, either from contract, ancient possession, or where the injury complained of, is direct, not where there is a mere probable or consequential injury. *Ib.*

O.

OATH.

An oath to the best of the party’s *knowledge and belief*, is a positive oath to the truth of the things sworn to, and if false the party will be guilty of perjury. *Harris v. Heberton*, 5 How. 575.

OFFICE, TENURE OF.

1. The constitution of the state provides that judges of the circuit court shall be elected, and hold their offices for the term of four years ; it also provides, in the section with reference to members of the legislature, that they shall be chosen every two years, on the first Monday and the day following in November ; and shall serve for the term of two years from the day of the commencement of the *general election* ; nothing is said in the constitution as to when the election for judges shall take place ; but in another clause of the constitution, the first Monday and day following in November is spoken of as the day

for the *general election* ; it was *held* that the *term* of office of the circuit judge would commence on the day of the general election, and if, in consequence of a vacancy, an election were held at a day subsequent to that of the general election, the person elected would hold only the unexpired term of the office until the next general election for circuit judges ; and would not hold for the period of four years from the day of his election. *Smith v. Halfacre*, 6 How. 582.

2. The tenure of all officers of the state who are named in the constitution, is for the term limited by the constitution and has its commencement and expiration on the day established by law for the general election throughout the state for the respective offices. *Ib.* ; and if the legislature provide that an incumbent of an office shall hold until a given time *and until his successor be qualified*, and make no provision for the election of his successor, he can only hold until the end of the given time, the residue of the law being unconstitu-

tional. *Houston v. Royston*, 7 How. 543.

3. Where by statute, the term of office of the clerk of the superior court of chancery, who by law was appointed by the chancellor, was limited to four years, and the statute did not prescribe the period of the commencement or termination of the term, upon the office being filled, the incumbent will have a right to the office for the full term of four years from the date of his appointment. *Hughes v. Buckingham*, 5 S. & M. 632.

4. Where an incumbent of an office, the term of which is fixed by statute, but the period of the commencement and termination of the term is not fixed, resigns or forfeits the office before the term is expired and the office is filled by a new appointment, the new appointee will hold the office for the full term, and not for the unexpired term of the former incumbent. *Ib.*

5. In March, 1833, by act of the legislature, the chancellor of the state was authorized to appoint his

own clerk, but no tenure of office was fixed by the act; in December, 1833, by a general law, the tenure of all offices, not otherwise fixed, was limited to four years; on the 9th of December, 1844, Hughes was commissioned by chancellor Buckner clerk of the chancery court for four years; on the 8th of January, 1846, Buckingham was commissioned clerk of the same court for four years by chancellor Cocke, on the ground that the term of office of clerk of the chancery court, commencing in December, 1833, continued for successive periods of four years each and expired in December, 1845, leaving the office vacant; *held*, that the law did not fix the commencement or end of the term of office of the clerk of the chancery court; that Hughes, the incumbent, was entitled to his office for four years from the date of his appointment and could not be ousted therefrom; and that the appointment of Buckingham was inoperative. *Ib.*

P.

PARENT AND CHILD.

1. The sale by a father, of the lands of his child, a minor, is void, under the common and Spanish law, if unauthorized by the decree of the proper tribunal. *Griffing v. Hopkins*, Walk. 49.

2. That the sale was for the benefit of the minor, does not render such sale valid. *Ib.*

3. See *Chancery*, 134, as to gift from parent to child, and when cancelled at suit of parent.

4. A voluntary deed of slaves, of parent largely indebted, to his child,

is void as to prior creditors. *Bogard v. Gardley*, 4 S. & M. 302.

5. It seems that a conveyance from a father, largely indebted at the time, to his minor son, the consideration of which was the alleged past services of the son, would be void as to creditors of the father; yet it seems that if the father has waived his right to the services of his minor son, or the son is emancipated by marriage, and become thereby entitled to his own labor, the father may contract with him, and remunerate him for services rendered, and become liable for their payment. *Dick v. Grissom*, Freem. Ch. 428.

6. A deed from father to son, who was a minor, yet married, the consideration of which was in part the alleged services of the son, declared void as to creditors, because, 1. That the father was largely indebted, and in failing circumstances, yet for four or five years prior to the conveyance and until on the eve of bankruptcy, the father had no reckoning with the son; 2. The continued possession and occupancy of the land, after the sale, by the father; 3. The deed by which the father acquired title to the land was withheld from record, until the deed from the father to the son was put on record; 4. A conveyance of the same land by the father after the sale to the son, to a third person, to secure a surety for the father, the son being held cognizable of the sale from his intimacy with his father and familiarity with his business; 5. An agreement between father and son, to deliver up to the son his note given in part of the purchase-money, because of a threatened sale under execution against the father, of a portion of the land; which sale never took

place, and yet the deduction from the price was made. *Ib.*

PARTIES.

1. A mere stranger cannot move for revocation of letters of guardianship. *Cotton v. Goodson*, 1 How. 295.

2. See *Bills of Exchange and Promissory Notes*, 24, as to right of surety who has become one of the assignees of a note, to sue his co-makers in his own name.

3. See *Partition*, 1, as to who must be parties to petition for.

4. The statute regards the usee as the real plaintiff, and he must have an interest, legal or equitable, in the cause of action. *Netterville v. Stevens*, 2 How. 642.

5. See *Evidence*, 17, as to who privies; and when deposition in one suit admissible, where parties different, in another.

6. It will be error in an action against two, where only one is served with process, to proceed to judgment against one without discontinuing the action as to the other. *Davis v. Tiernan*, 2 How. 786; *Dennison v. Lewis*, 6 How. 517. Actions *ex contractu* may also be discontinued as to part of the defendants, and judgment taken against the others. *Peyton v. Scott*, 2 How. 870; *idem*, if the note sued on be joint; it being made several by statute. *Lynch v. Commissioners of Sinking Fund*, 4 How. 377; *Woodhouse v. Lee*, 6 S. & M. 161.

7. So, also, a judgment may be rendered by default against one defendant, and on verdict against another in the same suit. *Ib.*

8. The owners of the soil are proper parties to, and have a right

to appeal from; a proceeding to subject their land to public uses, in a mode directed by statute. *Thompson v. Grand Gulf Railroad and Banking Co.* 3 How. 240.

9. The court of appeals will adjudge according to the rights of the parties to the record, though the record may show that other parties have a right paramount to either of the parties to the record. *Goode v. Mayson*, 6 How. 543.

10. See *Pleading*, 69; one firm may maintain an action at law against another firm, though the same person be a common partner in each.

11. The execution of an appeal bond for a jury trial in the justices' court, makes the sureties therein parties to the suit. *Wright v. Simmons*, 1 S. & M. 389.

12. See *Chancery*, 128, 129; what unconnected parties may unite in bill.

13. The rights of those not parties to a suit cannot be affected by the proceedings in the suit. *Pren-tiss v. Mellen*, 1 S. & M. 521; *Murdock v. Washburn*, *Ib.* 546.

14. If all the parties to an attachment at law are non-residents, the court has no jurisdiction. *Hosey v. Ferriere*, 1 S. & M. 663; otherwise, in chancery under the statute. *Zecharie v. Bowers*, *Ib.* 584.

15. If the clerk in entering the record of the judgment, prefix it with the title of parties not parties to the suit, it will not affect the validity of the judgment itself; which will relate back to the proper parties to the suit. *Grimball v. The Miss. and Alabama Railroad Co.* 3 S. & M. 38.

16. Where execution issues against several defendants, one of the defendants may lawfully pur-

chase under it. *Robinson v. Parker*, 3 S. & M. 114.

17. Where the heirs have made a division of their ancestor's realty, and the creditor of one of them attaches his interest, a decision in that suit will not affect the rights of the creditors of the ancestor. *Baynton v. Finnall*, 4 S. & M. 193.

18. See *Executor and Administrator*, 112; on death of joint maker of a note, suit may be revived against administrator of deceased maker and proceed, or be brought, jointly against him and survivors.

19. Where in a bill to recover the amount of a lost note, no objection was made in the court below of a defect in parties, it is too late to urge that defect in the high court of errors and appeals. *Truly v. Lane*, 7 S. & M. 325.

20. A mere stranger without interest in the matters in controversy, has no right to question the validity of the title to the property, as between the other parties to the suit. *Bingaman v. Hyatt*, 1 S. & M. Ch. 437.

See *Chancery*, tit. *Parties*.

See *Decree*; when it will not be set aside for want of formal dismissal as to parties not decreed against.

PARTITION.

1. In the partition of an estate among heirs and devisees, notice must be given to all the heirs and parties in interest, or they will not be bound by the act of the court making partition; nor will a division made under the order of the court without notice to all, on the application of persons claiming, but really having no interest in the property, and where there is no one made a party defendant, but

one illegally acting as administrator, bind the real heirs and distributees. *Vick v. The City of Vicksburg*, 1 How. 379.

2. W. filed his petition in the probate court for a partition of land; alleging that he had intermarried with one of several persons to whom the land had been jointly conveyed; the other persons alleged to be interested in the land, answered the petition, and denied that W. had any right, title, or interest in the land, or any part thereof, and W. offered no evidence in support of his petition; *held*, that the petition must be dismissed. *Ingram v. War*, 5 S. & M. 746.

PARTNERS AND PARTNERSHIP.

1. A surviving partner cannot sustain an action at law against the administrator of a deceased partner, on an unsettled account growing out of the partnership business. *White v. Waide*, Walk. 263.

2. It is a well-established rule of evidence, that one partner cannot be so divested of his interest in the firm by any act of himself and co-partners, as to be made a competent witness in a matter relating to the partnership. *Collins v. Flowers*, 1 How. 26.

3. One partner is not liable for articles purchased by his copartner in the name of the firm, which were not within the scope of the partnership, without proof that they were really for the benefit of the firm; as where A. and B. were partners in buying and selling hides, and A. buys a saddle, and has it charged to the firm, A. and B.

will not be liable, without proof that it was for the use of the firm. *Goode v. Linecum*, 1 How. 281.

4. The contracts of partners, being joint and several by the statute of 1836; it will not be error, in a suit on a contract against partners, to discontinue as to those on whom process is not served, and go to trial as against the others; perhaps *aliter*, by the common law. *Lyons v. Jackson*, 1 How. 474.

5. Service of process on one partner, will not justify a judgment against all the partners; and such a judgment on such service, being joint, will not be good against those served with process. *Pitman v. Planters Bank*, 1 How. 527.

6. Although one partner, notwithstanding the general rule that one cannot sue the other at law, may sue his copartner at law, where they have made a settlement, and agreed upon the balance, yet where an individual is a common partner in two firms, no engagement can be entered between the respective firms so that one can sue the other at law, as a man cannot sue himself. *Calvit v. Markham*, 3 How. 343; yet see *Pleading*, 69, *contra*.

7. Where in a suit by one firm against another, in each of which the same individual was a partner, it appeared that one firm was largely indebted to the other, and that the firm to whom the debt was due, was largely indebted to the member of that firm, who was not the member of each firm, a decree may be legally made against the indebted firm, in favor of the one to whom the creditor firm was indebted. *Ib*.

8. See *Bills of Exchange and*

Promissory Notes, 80 ; where one partner denies his liability under oath, and the others do not, the jury must find for one, and against the other.

9. See *Attachment*, 24 ; a bond by one partner in attachment is sufficient and obligatory on the firm.

10. A person sued as a partner, upon an open account, admits the partnership by pleading *non assumpsit* ; instead of denying the partnership on oath as the statute requires. *Jameson v. Franklin*, 6 How. 376.

11. In an action against partners for work and labor done, the plaintiff offered in evidence the acknowledgment in writing of one partner, that the account was a just one ; *held*, that the evidence was proper to go before the jury, whose province it was to say whether the partnership existed when the written acknowledgment was made. *Ib.*

12. Where an order was drawn by a client on two attorneys at law practising in partnership, to pay to a third person, a certain sum out of a claim, in the hands of the attorneys for collection, and one of the partners had notice of, and assented to the order, and the other partner afterwards purchased of his client the whole claim in their hands for collection, without having any actual notice of the previous assignment ; *held*, that the notice to one partner was notice to both, and that the right of the first assignee would be protected to the extent of his assignment. *Fitch v. Stamps*, 6 How. 487.

13. See *Pleading*, 69 ; one firm may sue another at law, though one person be a partner in each.

14. Under the statutes of this

state, making contracts of parties joint and several, if one partner only be sued, a judgment cannot be rendered against the firm ; and if a debtor of the firm be garnisheed by the judgment creditor, who has sued such partner singly, a judgment cannot be rendered against such debtor, unless the respective proportions of interest held by the different members of the firm appear ; in which event, a judgment against the garnishee may be rendered for that portion. *Mobley v. Lombat*, 7 How. 318.

15. It seems that under a judgment at law, on his individual debt, against a member of a firm, his interest in the partnership property may be sold ; subject, however, to partnership debts ; but where the judgment against him is an individual one for a partnership demand, the purchaser under it would perhaps take the interest free from all other partnership debts. *Ib.*

16. Where two persons sue as partners, and one dies, pending the suit, and his death is suggested on the record, without any formal judgment of abatement being entered, it will be sufficient for the surviving partner to carry on the suit in his own name ; if, however, the suggestion be false, the judgment in favor of the alleged survivor would be irregular and be set aside. *Sprawles v. Barnes*, 1 S. & M. 629.

17. Where a surviving partner sues and obtains judgment, and omits to issue execution for a year and a day ; and a *sci. fa.* to revive is sued out, and before a revival, the administrator of the deceased partner, without suggesting the death of the plaintiff, has himself entered plaintiff, and takes a judgment by default on the *sci.*

fa.; such judgment will be erroneous; and the administrator of the deceased partner be a mere intruder. *Copes v. Fultz*, 1 S. & M. 623.

18. See *Evidence*, 234; partner made competent witness only by mutual releases.

19. One partner cannot bind another by signing the partnership name to a forthcoming bond, even though both partners were defendants to the original judgment; such bond will be obligatory only on the partner who signs it, and will be *absolutely void* as to the other; and when such a bond has been given and forfeited, and property of the partner who did not sign it, has been sold under execution on the bond, such sale will be no title to the purchaser; and the judgment on the bond may be collaterally attacked in an action of ejectment for the land, brought by the purchaser; and be shown to be void for want of jurisdiction in the court to render it; even if it be law that in judicial proceedings one partner may bind the other by his bond, yet it cannot apply to a bond, which is to become the foundation of a judgment without further notice to the party who gives it. *Smith v. Tupper*, 4 S. & M. 261.

20. See *Contract*, 52-54; how far acts of association for banking, where new members are admitted, are binding on the new members; and how far, after dissolution of the association, its agents can bind it by new contracts.

21. In an action against partners upon an open account, service of process upon one will not be notice to the other, nor justify judgment against them; and where C. & D. were sued as partners, under the

style of C. & Co., and the sheriff returned the writ "executed on C. & Co.," the return was *held* insufficient, as not showing on which of the defendants it was executed. *Demoss v. Brewster*, 4 S. & M. 661.

22. By the statute of 1836, declaring the contracts of partners to be joint and several, the rule of pleading with reference thereto, is materially changed; it is not necessary, in suing in assumpsit on such a contract, to allege a partnership; and the plaintiff may declare against any one or more of the partners; and where a note is indorsed in the partnership name, and one of the partners had written at the foot of the note an agreement to acknowledge notice at a particular place, and notice was given according to the agreement; *held*, that in a suit against the other partners, such notice was sufficient to bind them. *Nutt v. Hunt*, 4 S. & M. 702. So, also, notice to a surviving partner will bind the representatives of the deceased partner, who died before the maturity of the note, although that fact was known to the holder at the time. *Dabney v. Stidger*, 4 S. & M. 749.

23. See *Probate Court*, 28; that court cannot entertain jurisdiction of a bill by the administrator of a deceased partner, calling the surviving partner to account, or seeking a discovery from him.

24. See *Pleading*, 94; as to the effect of pleading general issue by a partner defendant.

25. Although, as a general rule, one partner cannot sue his co-partner, at law, for a sum of money due on account of the partnership, unless it be the balance of a separate account, or a general balance of accounts; yet, where several

partners execute a note payable to one partner, even though on account of matters connected with the partnership, it is an acknowledgment of a separation of the sum from the partnership account, and the payee may maintain an action at law on the note; therefore, in an action by B., as the bearer of a note payable to M. or bearer, for the use of the Real Estate Banking Company of Hinds county, made by F. and others, on proof that the maker of the note and the payee were all members of the company for whose use the note was made; *held*, that B. might, notwithstanding, maintain his action on the note. *Bonaffe v. Fenner*, 6 S. & M. 212.

26. Where partners, when sued, seek to establish the existence of the partnership; they must produce the letters of partnership, or give a legal excuse for their non-production, before the partnership can be proved by other evidence. *Ib.*

27. Whatever the private agreements and contracts of partners may be, with reference to debts contracted by them, and the responsibilities of the partners respectively, they will be equally and jointly liable to those dealing with the partnership, for all debts lawfully contracted; where, therefore, P. sued D. & R. as partners, in a race-course, for work done on the course, and the articles of partnership contained a clause, that "the instrument was not to be so construed as to make the parties partners in the contracting of debts;" *held*, that the clause could not operate to the exoneration of the partner who had not employed P., and that he would be equally liable with the other partner. *Perry v. Randolph*, 6 S. & M. 335.

28. In an action by P. against D. & R., as the owners, in partnership, of a race-course, for work done on the course, R. denied, under oath, the partnership, and, after proof of a written agreement between D. & R. for the construction of the course, at joint expense and profit, P. offered to prove that though he was employed by D. to do the work, yet, that R. was often present, giving orders and directions concerning it, and shared the profits of the course after it was completed; *held*, that the proof was admissible, as tending to establish the partnership, and D. & R.'s joint liability. *Ib.*

29. Where a debt was contracted with a firm, and one of the partners sued for it in his individual name, declaring on it as a debt due to him, the defendant can avail himself of the fact of the debt having been contracted with the partnership, only by plea supported by affidavit; so, if a firm sue for a debt due one of the partners. *Ander-son v. Tarpley*, 6 S. & M. 507.

30. If a claim be placed in the hands of partners, to collect, and before any steps are taken the firm dissolve, and one of the members take charge of the claim, and render all the services in its collection, and sue individually the owner of the claim for his fees for so doing, the jury will be justified in inferring that it was part of the contract of dissolution between the partners that the one who has rendered the services should attend to the claim, and receive the compensation, and their verdict to that effect will be upheld. *Ib.*

31. Where one of two partners subscribes the partnership name to a note, as sureties for a third person, without the authority or con-

sent of the other partner, the latter is not bound, and it lies upon the plaintiff to prove the consent or authority of the other partners; such consent or authority may be presumed from circumstances; V. & A. were partners in trade; V. the active partner; A. in the habit of frequenting the store, but not managing the business. V. was in the habit of indorsing the firm name of V. & A., and signing it as sureties for third persons; and notices of the coming due of such liabilities were often left at the store of V. & A.; but it was not proved that they were ever brought to the knowledge of A., except in one instance, when he denied V.'s authority so to use the firm name; *held*, that the facts were not sufficient to uphold a verdict against A. on a note signed by V. & A. as sureties. *Andrews v. Planters Bank*, 7 S. & M. 192.

32. See *Executor and Administrator*, 198.; partnership and individual claims against a deceased person, entitled to equal distribution of his assets.

33. The interest of one partner, in partnership property, may be sold under execution at law, on a judgment against such partner for his separate debt; and equity will not enjoin the sale, until the partnership accounts are settled; the only interest conveyed, by such sale, is the interest of the partner after the payment of the partnership debt; the purchaser, therefore, is not entitled to a division, or separate possession, by the purchase, but takes it *cum onere*; the sheriff does not seize the property sold, but it is retained by the other partner, subject to the lien of the partnership debts. *Sitler v. Walker*, Freem. Ch. 77.

34. One partner has the right to sell the whole of the partnership property, if the sale be free from fraud on the part of the purchaser, and such sale terminates the partnership relation; and if the proceeds of sale be invested in land, the partners are joint tenants in those lands, and the right of one partner therein, cannot be affected by the act of his copartner; and if the capital stock, before such sale, all belonged to one partner, he will still have the same right in the land, which will prevail against a purchaser from the other partner, where the title in the partners was merely equitable. *Whitton v. Smith*, Freem. Ch. 231.

35. Where one partner, having a deed to lands to the firm, surrenders up the deed to the grantor, and has a new deed made to a third person, without the assent of the other partners, such new deed is void; the interest, which passed by the first deed, will remain, and cannot be divested by its subsequent surrender and destruction. *Ib.*

36. The creditors of a partnership have no *lien* on the partnership property for the satisfaction of their debts; the right so to apply partnership property, exists only as between the partners, and ceases whenever there is a sale by one partner to the other of the stock in trade; where, therefore, such sale has taken place, and the partner to whom the goods were sold, has resold them, and assigned the notes for the purchase-money, such notes in the hands of the assignee, cannot be subjected to a subsequent judgment-creditor of the firm. *Parish v. Lewis*, Freem. Ch. 299.

37. A purely legal claim can be enforced against a partnership only

at law, unless one of the partners be dead, when, it seems, the creditor may proceed, in equity, against the survivor, and the representatives of the deceased partner. *Ib.*

38. P. agreed to execute to M. his notes for ten thousand dollars, for one-half interest in M.'s store and stock of goods, on the execution of which they were to carry on the business in partnership; P. never executed the notes, but M., supposing that he would at any time, kept the articles of partnership unsigned, until he should do so, and suffered P. to take possession of the half of the goods, and act ostensibly as his partner; P., on application of M., refused to execute the notes, and declared his intention to hold on to his partnership interest: *Held*, that as between P. and M. the partnership had never had an existence; the execution of P.'s notes, was a condition precedent thereto; and a court of equity would lend M. its aid to recover the goods; and that P. would have no right to an account and division of the profits, since their connection; nor will the fact that the parties held themselves out to the world, as partners, be a waiver of the original terms of the partnership; for a waiver does not take place, unless there is clear evidence of an abandonment of those terms, or the substitution of new terms. *McGraw v. Pulling*, Freem. Ch. 357.

39. In such case, a court of chancery would enjoin the recusant partner from intermeddling with the alleged partnership goods, and would not permit him, on an offer to do so, to execute his notes, and take his place in the partnership, after having forced the other into

a court of equity; but the court would require the other partner to execute a bond of indemnity, to indemnify the rejected partner against any liabilities incurred to third persons. *Ib.*

40. An unincorporated association of men, for the purpose of banking, is but a private partnership, and their contracts and liabilities are those of private partners. *Boisgerard v. Wall*, 1 S. & M. Ch. 404.

41. Articles of partnership regulate the rights and powers of the partners as among themselves, but as to third persons, they may be altered by the conduct of the partners, so as to be contrary to, or beyond their original terms. *Ib.*

42. Where, by the articles of partnership association for private banking, each partner was to execute a mortgage to the partnership, to secure the payment of his stock in the partnership, and afterwards the mortgages were made, securing not only the stock, but also the circulation and debts of a general character of the partnership; *held*, that the mortgages were a security for the debts of the partnership, to which a creditor, to whom the partnership had assigned the mortgages might resort. *Ib.*

43. Where debts due to a partnership, in five, ten, and fifteen years, had been secured by mortgages, the creditors of the partnership could not have any more summary remedy on the mortgages, than the partners themselves would have. *Ib.*

44. Where each partner executes a mortgage to the partnership, for the purpose of *binding and rendering himself liable to pay* the partnership debts, and in the condition of the mortgage re-

cites that the mortgage is to be discharged when the *liabilities* of the partnership are *all* paid; *held*, that one object of the mortgage was, to secure the payment of the debts of the partnership. *Ib.*

45. F. filed his bill against W. F., alleging that they had been partners, and that W. F. was indebted to him on their partnership liabilities, and also on his private account, in a large sum, not reduced to judgment, and seeking to attach a debt due by M. & D. to W. F., to be appropriated to the payment of W. F.'s debt to F.; *held*, that the court of chancery had no jurisdiction of the case. *Freeman v. Finnall*, 1 S. & M. Ch. 623.

46. A mortgage being given to secure a debt to a partnership, upon the death of one of the firm, the surviving partner is the only necessary party to represent the partnership interests, and foreclose the mortgage. *Robinson v. Thompson*, 1 S. & M. Ch. 454.

PATENT.

1. Patent is not the only evidence of title; act of congress of March, 1803, conferring donations of land itself title. See *Title*, 1, 2. *Hackler v. Cabel*, Walk. 91.

2. See *Chancery*, 123; for jurisdiction of, against patentee for fraud in procuring patent.

3. See *Evidence*, 191; the mode of compelling production of patent.

4. See *Evidence*, 89; for effect of patent, as evidence of the performance of preliminary steps to its issuance.

5. See *Deed*, 15; effect of,

where patent to vendor is junior to vendor's deed to vendee.

6. A patent may be impeached for illegality or fraud, and declared void in a court of law, as well as a court of equity; and a patent which issues from the general government, to land, which has been previously appropriated by the government, is void. *Hit-tuk-ho-mi v. Watts*, 7 S. & M. 363.

PAYMENT.

1. See *Practice*, 15; as to defendant's right to credits on plaintiff's account, where the account is withdrawn by plaintiff.

2. See *Pleading*, 20. Plea of payment good, without list of offsets.

3. Possession, by the drawee, of an order on him for the payment of a certain sum on a judgment, is *prima facie* evidence of payment. *Witherspoon v. Cain*, Walk. 407.

4. The plea of payment admits the execution of the bond sued on. *Hines v. Rogers*, Walk. 486.

5. See *Assumpsit*, 4; as to plea of payment, in actions of assumpsit, where plea of general issue, also, is filed, and verdict rendered only on the latter plea.

6. See *Covenant*, 1; how far pleadable in action of.

7. See *Limitations, Statute of*, 8; how far pleadable to payments.

8. The presumption of payment of an open account, the items of which were dated before the note of the party claiming the open account, is a question for the jury; and the consideration of the note may be shown. *Carpnew v. Canavan*, 4 How. 370.

9. A plea of payment, purporting to file offsets, but not doing so,

may be disregarded. *Miller v. Brooks*, 4 S. & M. 175.

10. Any evidence of actual payment may be given, in evidence, under the plea of non-assumpsit. *Ib.*

11. Where a plea of payment of the whole sum demanded, is filed, and the defendant proves payment of part only, he is entitled to a credit of that part which he proves to be paid. *Price v. Sinclair*, 5 S. & M. 254; *Cage v. Iler*, 5 S. & M. 410.

12. Where N. was indebted to M., on his own account, and also collaterally, as surety for Y., and made payments to M., without specifying to which debt they were to be appropriated; *held*, that the law would apply the payments made, under such circumstances, to N.'s own debt. *Newman v. Meek*, 1 S. & M. Ch. 331.

13. Where a bill of exchange was taken by a judgment-creditor from his debtor, the amount of which, if paid, was to be credited on the judgment, and the bill was not paid; *held*, on a bill filed by the judgment-debtor, to enjoin so much of the judgment at law, that the judgment-creditor must either credit the judgment, or deliver back the bill of exchange. *Ib.*

14. It is settled, that if a party who is indebted on a mortgage and simple contract, or on a bond and simple contract, make a payment, and omit to apply it specially to one of the debts, the law will make the application, in the way most beneficial to the debtor; that is, to the mortgage or bond. *Poindexter v. La Roche*, 7 S. & M. 699.

15. Where a person who is indebted, both on a bond and on a judgment, sells his land, and the purchaser makes him a payment,

without applying it to either the bond or the judgment, the law will apply it to the judgment, in exoneration of the land. *Ib.*

16. E. purchased land of P., which was incumbered by a mortgage, executed by P. to W., as agent of L., to secure the purchase-money of the land, bought by P. of W., as agent of L.; W. also held a claim, in his own right, against P., not included in the mortgage; E., being indebted to P. for the land, paid the money to W. on P.'s account, not knowing that P. was indebted to W., individually, and without making any application of the payment: *Held*, that W. had no right to apply the payment to his individual debt; and that the law would apply it to the reduction of the incumbrance resting on the land. *Ib.*

17. Where a creditor has two claims against the same debtor, one of which is well secured, and the other not secured, on a payment being made, the court will apply the same to the payment of the claim, for which there is no security; and the same principle will apply to set-off; where a bill is filed to foreclose a mortgage, and the defendant answers that the complainant is in debt to him, the court will order the latter indebtedness to be set-off against a separate debt, due the complainant, not secured by mortgage. *Planters Bank v. Stockman*, Freem. Ch. 502.

PERSONAL PROPERTY.

1. On a sale of personal property with warranty of title and delivery of the possession, the vendee, before eviction, cannot set up the want of title in the vendor as a bar

to the recovery of the purchase-money. *Brown v. Smith*, 5 How. 387.

2. See *Fraud*, 13, 25, 31; where vendor retains possession after sale, or grantor, in a deed of trust, after forfeiture.

3. Personal, may as well be the subject of a conditional sale, as real property; and although possession may be *prima facie* evidence of ownership, it is subject to be rebutted. *Mount v. Harris*, 1 S. & M. 185.

4. Property purchased upon conditions cannot be levied on by the creditors of the purchaser after the conditions have failed; especially if the parties had previously rescinded the contract. *Ib.*

5. Without some statutory provision, the registration of titles to personal property is not required. *Palmer v. Cross*, 1 S. & M. 48.

6. The statute of frauds, making possession for three years, vest the title to personal property, does not apply, unless the possession has been continued for three years in this state. *Ib.*

7. Whether a married woman can part with her personal property in any other mode than the one prescribed by the instrument of settlement. *Quære?* *Ib.*

8. The act of the legislature of 1822, respecting the title of personal property, and requiring the deeds thereto to be recorded in the county where the property is situated, does not apply to conveyances of personal property made prior to the passage of the act. *Ib.*

9. See *Chancery*, 159; when court of equity will enjoin a sale of personalty.

10. Where personal property was sold on condition, and the contract of sale was not recorded, the pos-

session continued in the vendee for three years; *held*, that his title was absolute as to his creditors, and was liable to his debts. *Lewis v. Gilmer*, 3 S. & M. 560.

11. As a general rule, when personal property is sold on a credit, the vendee acquires the right of property and the right of possession, unless there be some stipulation to the contrary; but if before possession be delivered the vendee becomes insolvent, the vendor may protect himself, if payment has not been made, by refusing to deliver possession; nor will it make any difference, that the vendee had deposited notes as collateral to secure the purchase-money, if no money had in fact been realized from such notes. *Hunter v. Talbot*, 3 S. & M. 754.

12. See *Chancery*, 287-290; for sale of, by commissioners under decree of foreclosure of mortgage.

13. The removal by the grantor in a deed of trust, of personal property from the county in which the deed of trust is recorded to another county, will not, unless shown to have been done with the permission of the trustee or *cestui que trust*, affect the lien previously attached by the deed. *Bogard v. Gardley*, 4 S. & M. 302.

14. It is a general rule, that in an action for the price of a chattel, the vendee may prove, in defence, deceit on the part of the vendor, and that the article is of no value; or he may show a partial unsoundness in mitigation of damages; he cannot, by his own act alone, return and revest the property in the seller, and recover the price paid, on the ground of a total failure of consideration; nor can he, by the same means, protect himself from the payment of the price on the

same ground. *Harmon v. San-
derson*, 6 S. & M. 41.

15. In an action for the price of a chattel, proof that the representations of the seller, at the time of sale, were fraudulent and the article of no value, will alone warrant a verdict for the defendant; however far the evidence may extend in mitigation of damages. *Ib.*

16. Whether the sale of personal property under a deed of trust, while the property is in the adverse possession of another, is binding. *Quære?* *Hundley v. Buckner*, 6 S. & M. 70.

17. Where personal property is sold for cash, the purchaser cannot take the property or sue for it without payment or tender of the purchase-money. *Ib.*

18. If, in the sale of personal property, both parties are equally cognizant of an alleged defect in title, and there is no warranty nor fraud, the purchaser cannot avoid the payment of the purchase-money, though he lose the property by reason of the defect known to exist in the title. *Hutchinson v. Minis*, 7 S. & M. 388.

PLEADING.

1. In an action, on a contract to deliver a certain quantity of cotton, on demand, a consideration must be averred, and the omission to do it, is fatal, not cured by verdict. *Minor v. Michie*, Walk. 24.

2. Where the contract is to deliver onerous property, on demand, and no time or place is specified for its delivery, in the agreement, a special demand must be alleged and proved. *Ib.*

3. Appearance and plea cure absence of, or defect in, original

process. *Delahuff v. Reed*, Walk. 74; *Stevens v. Richer*, 1 How. 522; *Young v. Rankin*, 4 How. 27.

4. Where the declaration omits to state the time of the promise and the value of the articles sold and there is a plea and verdict such omission will be cured by the verdict. *Ib.*

5. An issue and verdict cure a defects in pleading, however fatal on demurrer, if the issue be such as to require the proof, on the trial of the facts omitted in the pleadings. *Ib.*

6. See *Executors and Administrators*, 4; as to the mode in which a party should be described, to be a bar to second suit. *Cushing v. Gibson*, Walk. 87.

7. After plea of payment, a judgment by default is erroneous. *Selser v. Wilkinson*, Walk. 108. So, of any plea. *Dickson v. Hoff*, 3 How. 165. But not if the plea be no answer to the action, such as covenants performed to an action on an administration bond, alleging special breaches. *Shropshire v. Judge of Probate*, 4 How. 142. So, also, of verdict and judgment on *non-assumpsit*, when other plea are undisposed of. *Bozman v. Brown*, 6 How. 349.

8. See *Trespass*, 2; as to form of action for injury to slave while hired out. *McFarland v. Smith*, Walk. 172.

9. In declaration on bonds with condition, the condition need not be set out in the declaration; no need the words of the bond be used so their clear and precise legal effect be stated. *Muller v. Jelks*, Walk. 205.

10. A verdict without judgment will not sustain the plea of former recovery. *Buller v. Stephens*, Walk. 219.

11. On sustaining a demurrer to a plea, there should be a judgment of *respondeat ouster*. *Douglass v. Hendricks*, Walk. 230; *Southward v. McLaughlin*, *Ib.* 325; *Beatey v. Harkey*, 2 S. & M. 563.

12. The statute allowing more pleas than one, means legal pleas; the court may therefore reject a special plea, as frivolous, which amounts to the general issue. *Moore v. Mickell*, Walk. 231.

13. An averment in a replication requires no stronger proof than one in a declaration; therefore, where, in a replication, the party pleading a promissory note averred its consideration, *held*, that he was not bound to prove it. *Ib.*

14. A plea in bar is a waiver of a plea in abatement. *Pearce v. Young*, Walk. 259.

15. See *Executor*, 9; as to proof under general issue. *Dean v. McKinstry*, 2 S. & M. 213; *Webster v. Tiernan*, 4 How. 352.

16. A count in debt upon a promissory note may be joined with a count upon a sealed instrument. *Mardis v. Terrell*, Walk. 327.

17. See *Jeofails*, statute of 5, 6; as to what defects in pleading cured by.

18. On demurrer to a replication, the validity of the plea may be considered. *Miles v. Myers*, Walk. 379.

19. A plea that the plaintiff's fence, inclosing his premises, was not sufficient, is no answer to a declaration that the defendant broke and entered the close, and with his oxen destroyed and carried off two hundred bushels of corn. *Ib.*

20. A plea of payment, without the items of offset, is nevertheless a good plea; as the payment may

have been made in money. *Prim v. Kittridge*, Walk. 390. And it will be error to take a verdict on general issue without answering such plea. *Webster v. Tiernan*, 4 How. 352.

21. The plea of payment admits the execution of the bond sued on. *Hines v. Rogers*, Walk. 486.

22. *Nil debet* is not a good plea to an action of debt on bond with conditions, where they are not set out. *Barfield v. Kearney*, Walk. 504.

23. Pleas in abatement are looked upon with disfavor by the courts, and technical objections to them are sustained; a plea in abatement, therefore, which admits the jurisdiction of the court, but does not make *full defence*, is bad on demurrer. *Babcock v. Scott*, 1 How. 100.

24. Where there is a demurrer filed in the course of the pleadings, the court should give judgment upon the first error in pleading; the demurrer reaching back to defects in the previous pleading. *Wren v. Span*, 1 How. 115.

25. Although executors and administrators are not bound to plead the statute of limitations, but may, by statute, make the defence under the general issue, yet, if they attempt to plead the statute, they must do so strictly, and show affirmatively that they come within its provisions. *Ib.*

26. The plea of the statute of limitations, by executor, of the non-presentation of the claim within the period prescribed by law, is bad, if it do not state when letters testamentary were granted, and that the two months' publication was made for six successive weeks, as required by law. *Ib.*

27. See *Process*, 5; for plea in abatement to writ.

28. In actions *ex contractu*, the verdict and judgment must be alike against all the defendants or none. *Jones v. McGahey*, 1 How. 128.

29. See *Assumpsit*, 4; as to where plea of general issue and payment are both filed, and verdict rendered only on the former.

30. To an action on a note dated at a particular day, and payable at a future one, and also on an account, the plea of *non-assumpsit infra sex annos* is not a good plea; it should be that the cause of action did not accrue within six years. *Slocumb v. Holmes*, 1 How. 139.

31. A replication should answer the entire plea; where, therefore, a plea was to the entire declaration, and the replication sets out *precludi non*, as to the second and third counts, it is bad. *Ib.*

32. The statute authorizing the filing of several pleas, does not extend to replications or any subsequent pleadings; where the defendant has put in more than one rejoinder to a replication, he may elect which he will rely on; but more than one is inadmissible. *Ib.*

33. A plea to an action of trover for a slave, that the slave was levied on by an attachment, at the defendant's suit against the plaintiff, and was delivered by the sheriff to the defendant for safe keeping, and afterwards a judgment was rendered on the attachment by the justice, who ordered the slave to be sold, and that the defendant held the slave by virtue of the writ of attachment levy, and by virtue of the order and judgment of the court, is bad, for duplicity. *Welch v. Jamison*, 1 How. 160.

34. In an action on a bond, the condition of which was, that the defendant should "pay the condemnation money, or render his body in exe-

cution," and the breach averred that he had not paid the condemnation money, it was *held* to be bad; it should also have averred that he had not rendered his body in execution. *Shaefer v. Minor*, 1 How. 218.

35. See *Real Estate*, 12 and 13; as to plea of failure of consideration of note given for land.

36. See *Chickasaw Treaty*, 1, as to variance, in pleading the treaty.

37. See *Process*, 6; may demur for variance between writ and declaration.

38. Where the defendant, by his plea, admits a portion of the claim to be due, but avers a failure of consideration of the residue, he need not make a tender of the amount due; the plaintiff can take a judgment *nil dicet* for it. *Williams v. Harris*; 2 How. 627.

39. A plea beginning, "The defendant says *actio non*, any further than the sum of," &c., will be sufficiently formal where it admits, a part, but denies the residue to be due. *Ib.*

40. The defendant cannot plead *non assumpsit*, and tender, to the whole declaration; nor can he plead *non assumpsit*, and a plea admitting a part of the debt to be due; the latter plea will, in connection with *non assumpsit*, be bad on demurrer. *Ib.*

41. A plea that the consideration of the note sued on had failed is bad, as being too vague and general. *Ib.*

42. A plea in bar need not describe the defence with the same accuracy, that a declaration must the cause of action; and where a defendant to a suit, on a note, desired to plead that the note was given for negroes warranted to be sound, and which were not sound he need not aver that the note was

given in consideration of the warranty; nor that the warranty was executed before the note. *Id.*

43. After a demurrer is sustained to a plea, and *respondeat ouster* awarded, the defendant must plead to the merits issuably, and if he plead a bad plea, the judgment will be *quod recuperet*. *Davis v. Singleton*, 2 How. 673; *Brown v. Smith*, 5 How. 387.

44. See *Judgment*, 30; *nil debet* bad plea to action on judgment.

45. The plea of *non damnificatus* is a good plea to an action on a bond which one partner gives to another, when buying out his interest in the partnership, to save the retiring partner harmless, and pay the partnership debts; even though the declaration aver the non-payment, by the obligor, of a particular debt, and the payment of it by the plaintiff. *Hough v. Perkins*, 2 How. 724.

46. A general demurrer to several breaches is bad, if one breach be good; the demurrer should be special to each breach. *Harmon v. Thompson*, 2 How. 808.

47. See *Executor and Administrator*, tit. *Bond of*; as to when and how put in suit, and for pleadings therein.

48. Whether, where there are two pleas, one of which is replied to, and the other not, and the case is submitted to the jury, who render a verdict, the trial on the issue will be considered a waiver of the plea undisposed of, *quære*? *Roberts v. Haley*, 2 How. 886.

49. See *Contract*, 23; for what sort of action to institute, where no promise, express or implied, exists.

50. See *Abatement*, 2; for plea for *non-joinder* of parties, under act of 1837, requiring all parties to a note to be sued in one action.

That act is constitutional as to contracts made before its passage. *Rapleye v. Hill*, 4 How. 295.

51. See *Corporation*, 3, 4 and 6; as to effect of plea of general issue in admitting the character of the parties suing.

52. Under the statutes of this state, the plea of general issue admits the execution of the instrument sued on. *Green v. Robinson*, 3 How. 104; *Ellis v. Planters Bank*, 7 How. 235. But evidence of alteration, since the execution of the note, may be given in evidence, under the general issue, not sworn to. *Henderson v. Wilson*, 6 How. 65.

53. See *Evidence*, 83; for correspondence of *allegata et probata*.

54. See *Bill of Exchange*, 49; how promise laid, where indorser dies before debt due.

55. See *Deed*, 20; for mode of pleading a claim under a deed of gift.

56. See *Garnishment*, 6; as to how maker, when sued, must plead payment as garnishee of payee.

57. The plea of *non assumpsit*, sworn to, is, under the act of the legislature of 1824, prohibiting the denial of the execution of a note, except by plea, verified by oath, equivalent to the plea of *non est factum*, and puts in issue the execution of the note, which will be proved by proof of the signature to the note. *Sumpter v. Geron*, 4 How. 263. And in case one is sued as a partner, and plead *non assumpsit*, sworn to, it will be also a denial of the partnership. *Fairchild v. Grand Gulf Bank*, 5 How. 597.

58. A plea is an appearance for party not served. See *Appearance*, 3.

59. A contract, the terms of

which could not be understood without extrinsic aid, may be declared on, and the deficiency supplied by proper averments; where, therefore, a suit was brought on this contract: "I promise to pay C. \$480; it being for the public money due on a half section of land, one payment only being made; the money to be paid agreeably to the requisitions of the late law, made for the benefit of former purchasers;" *held*, that a declaration, averring what law was meant, what instalments were required, and when due, would be good on demurrer. *Riley v. Vanhouten*, 4 How. 428.

60. Under the statute of this state, authorizing a party to plead as many pleas as he may think proper, the proof of one issue is not dispensed with by any admissions made in another plea. *Doss v. Jones*, 5 How. 158.

61. A plea merely informal cannot be treated as a nullity; therefore, a plea to an action of assumpsit, that "the defendants come into court, in proper person, and say they did not undertake or promise to pay as set forth in plaintiff's declaration, and they put themselves on the country," cannot be treated as a nullity. *Templeton v. Planters Bank*, 5 How. 169; *Tomlinson v. Hoyt*, 1 S. & M. 515.

62. Where a demurrer is withdrawn before argument or judgment on it, the defendant may, under the permission of the court, plead without an affidavit of merits. *Ogden v. Glidewell*, 5 How. 179.

63. Where a demurrer to a plea is filed, and the defendant confesses the demurrer, and asks and obtains leave to amend his plea, which is done, and a second demurrer is

filed and sustained to the amended plea; *held*, that the judgment should be *respondeat ouster*, and not final, for the plaintiff; as the confession of the demurrer is not equivalent to a decision of the court thereon; it would be otherwise had the court passed upon both demurrers. *Brown v. Smith*, 5 How. 387. Where the court has sustained a demurrer to pleas a second time, the plaintiff is entitled to judgment for want of a plea. *Harrison v. Balfour*, 5 S. & M. 301.

64. A plea of non assumpsit admits the execution of the note sued on. *Fairchild v. Grand Gulf Bank*, 5 How. 597; *Wade v. Stanton*, *Ib.* 631.

65. Where the plaintiff elects to demur to a plea which he might have treated as a nullity, a judgment, on a verdict rendered on a plea of non assumpsit, will be erroneous, without a disposition of the demurrer, and the statute of jeofails will not cure the error. *Marlow v. Hamer*, 6 How. 189.

66. After the plaintiff has demurred to a plea, he cannot elect to treat it as a nullity. The demurrer must be disposed of. *Walker v. Walker*, 6 How. 500; and it will be error to render a final judgment without disposing of the demurrer. *Rowley v. Cummings*, 1 S. & M. 340; *Anderson v. Burke*, 6 S. & M. 475.

67. Where a plea in abatement, for variance between the writ and declaration, was filed and demurred to, and the defect afterwards cured by amendment, and the demurrer therefore overruled, the judgment should be *respondeat ouster*, and not *quod recuperet*. *Ib.*

68. See *Judgment*, 72, what judgment of the court will be rendered

where there is a demurrer to a plea in bar overruled.

69. Under the statute of this state, which makes the liabilities of partners joint and several, an action may be maintained by a firm on a note made by another firm, although the same person was a partner in each firm; the common partner not being joined in the suit as defendant. *Morris v. Hillery*, 7 How. 61.

70. It is sufficient, in pleading, to state a *prima facie* case; rebutting matter must come from the other side; where, therefore, a defendant plead a *levy* on his property under an execution against him as surety for the plaintiff, as an offset, he need not aver a sale of the property levied on. *Kershaw v. Merchants Bank of N. Y.* 7 How. 386.

71. It seems a joint action under the statutes in this state may be brought against the surviving parties to a contract and the representatives of the deceased parties. *Jones v. Stanton*, 7 How. 601; *sed contra*, an executor of a deceased maker cannot be sued with the survivor. *Poole v. McLeod*, 1 S. & M. 391.

72. Where the record exhibits a plea in the proper place for it, without stating when it was filed, the presumption of law is, that it was filed in proper time, and that presumption will not be rebutted by a judgment by default given in the case. *Tomlinson v. Hoyt*, 1 S. & M. 515.

73. See *Practice*, 45; answering over under a judgment overruling a demurrer, is not a waiver of the demurrer.

74. Where a contract or instrument does not of itself import a consideration, the consideration on which it is founded must be aver-

red in the pleadings. *Willis v. Ives*, 1 S. & M. 307.

75. See *Seal*, &c. how parties to sealed instruments can plead in a court of law that they are sureties only, and have been discharged as such.

76. See *Attachment*, 31-34; appearance and plea, since act of 1840, discharges attachment.

77. Proceedings in causes brought from justices' court are *de novo*, and without any pleadings whatever. *Wright v. Simmons*, 1 S. & M. 389; *Hairston v. Francher*, 7 S. & M. 249; yet if the parties undertake to conduct and carry on the cause by written pleadings, they will be held to the rules of pleading. *Atkinson v. Fortinberry*, 7 S. & M. 302.

78. A general demurrer to a plea, however informal and open to special objections, if it is not so defective that judgment cannot be given according to law and the right of the cause, must be overruled; therefore a plea to an action on a note, that the note was given for a certain lot, and that the consideration had wholly failed for want of title in the vendor, is good upon general demurrer. *Ray v. Woolfolk*, 1 S. & M. 523.

79. If to an action on a penal bond with a condition to recover damages for a breach of the condition, the defendants plead general performance and the plea be replied to, and issue joined, the burden of proof is on the plaintiff, and to entitle him to recover he must prove the breach of the condition, as alleged in his declaration; if the defendant plead special performance, the rule is otherwise. *Holiday v. Cooper*, 1 S. & M. 633.

80. See *Variance*, for what course to be taken where variance exists

between instrument sued on, and the one offered in evidence.

81. See *Fraud*, 22; may be given in evidence under general issue.

82. Where the plaintiff avers a fact in his declaration, the converse of which, if pleaded and proven by the defendant, would constitute no defence, as an allegation of demand and notice by the guarantor of a note, such allegation need not be proved. *Thrasher v. Ely*, 2 S. & M. 139.

83. Where demurrer to a plea is sustained, and the defendant answers over, and a demurrer to his second plea is sustained, he may assign in the high court, as error, the judgment of the court below in sustaining the demurrer to his first plea. *Ellis v. Martin*, 2 S. & M. 187.

84. See *Assignor and Assignee*, 5; by whom suit on an assigned judgment belonging to a bankrupt, should be brought.

85. A general demurrer to a declaration containing nine counts, will be overruled if only one count be good, though all the others be bad; and by our statute a verdict rendered generally on such declaration, and judgment thereon, would be good; though a different rule would prevail at the common law. *Scott v. Peebles*, 2 S. & M. 546.

86. An executrix cannot implead in the probate court, the legatees and distributees of her testator and the representatives of a deceased legatee, and bring into contest the estate of the testator and that of the deceased legatee, and call upon the other legatees to account for their personal indebtedness to her, and praying that the testator's estate might be sold to pay it; such petition would be multifarious; in-

congruous interests and subjects, and those over which a probate court has no control, cannot be brought into the same petition. *Green v. Green*, 3 S. & M. 256.

87. Where a party defendant, after demurrers have been sustained to his pleas, pleads a demurrable plea, but issue is taken on it, and both parties agree that under that plea any special matter in defence might be given in evidence; held, the judgment sustaining the demurrers to the first pleas, if erroneous, would not be error to the prejudice of the defendant. *Montgomery v. Dillingham*, 3 S. & M. 647.

88. A plea of payment concluding with these words, "and he herewith files his bill of particulars, and will insist upon them as an offset," when no bill of particulars was in fact filed, may be disregarded by the plaintiff, and a failure to file a replication thereto constitutes no ground of reversal; *aliter*, had it been a mere plea of payment. *Miller v. Brooks*, 4 S. & M. 175; for such plea, without the account of set-off, is good, and the defendant under it may prove either a partial or total payment in money, by parol or written evidence. *Price v. Sinclair*, 5 S. & M. 254; *Cage v. Her*, *ib.* 410.

89. See *Judgment*, 114, 115; the plea of want of notice in an action on a judgment of the original suit is a good plea, and the appearance of the defendant must be replied.

90. In a plea of *nil tiel record*, a verification is unnecessary, because the plea is in the negative; and being unnecessary, it will be rejected as surplusage, and does not vitiate. *Wright v. Weisinger*, 5 S. & M. 210.

91. If a plea be in the record, filed a term subsequent to the return term, it is presumed to have been so filed with the permission of the court; and it will be error not to respond to it; for though pleadings are defective, whether plead improperly in point of time or point of law, yet if the former is alleged, its propriety must be tested by a motion to strike out. *Price v. Sinclair*, 5 S. & M. 254.

92. See *Discontinuance*, 7; whether the old law of discontinuance is in force here.

93. See *Guaranty*, 4-6, for mode of charging guarantor in declaration.

94. If a person sued as indorser, plead the general issue, he thereby admits the character of indorser in which he is sued. *Tillman v. Ailles*, 5 S. & M. 373; so, where C., being sued in assumpsit as a partner in an unincorporated banking company, upon a bill of exchange, alleged to have been signed by M. as the agent of the company, plead the general issue, he thereby admitted the existence of the firm, that he was a partner, and that M. was the agent of the partnership. *Cook v. Martin*, 5 S. & M. 379.

95. See *Bills of Exchange and Promissory Notes*, 178. The plea that the plaintiff is not the lawful owner of the note sued on, is bad, as amounting to the general issue.

96. See *Bills of Exchange and Promissory Notes*, 179, for mode of pleading duress.

97. By pleading to the merits, the defendant waives any objection that may exist as to the character in which the plaintiff has brought the suit. *Hemphill v. The Bank of Alabama*, 6 S. & M. 44.

98. However defective a plea

may be in form, if it be appropriate to the form of action and go to the substance of it, it will be error to strike it out or reject it. *Smith v. Commercial Bank of Rodney*, 6 S. & M. 83.

99. Special pleas which amount to the general issue, must be specially demurred to; they cannot be stricken out upon motion. *Ib.*

100. E. and others made a note payable to E., president of the board of trustees in township three, of range thirteen east, and his successors in office; W., as president of the board of trustees of schools and school lands in that township, sued E. and others on this note, and averred in the declaration that by the description of the payee in the note was intended, "President of the board of schools and school lands," &c.; and that the plaintiff was successor of E. in that office; the declaration was held good on demurrer. *Land v. Warner*, 6 S. & M. 155.

101. Where intestate has been sued and plead in his lifetime, that plea will be the plea of the administrators on revival, unless they plead for themselves.

102. Where a declaration against an attorney at law, for neglect in suing upon a claim placed in his hands for collection, contained several counts, in some of which the claim was described as a promissory note, and in others as a writing obligatory, the defendant's plea to the whole action in other respects formal and containing a bar to the action, will not be defective for describing the claim as a writing obligatory. *Ransom v. Cothran*, 6 S. & M. 167.

103. In an action on a note payable "to M. or bearer, for the use of the Real Estate Banking Com-

pany," it will not be necessary to set out the words stating for whose use the note was made, as they constitute no part of the legal contract. *Bonnaffe v. Fenner*, 6 S. & M. 212.

104. If an action be founded on a note, and in the pleadings the word "note" is used without words of identification, it will be understood of the note mentioned in the previous pleadings. *Grover v. Gaunt*, 6 S. & M. 317.

105. To a declaration on a bond for payment of money, the defendant plead that the bond was executed for the hire of a negro by the plaintiff to the defendant, from January 1, 1841, to January 1, 1842, and that the negro, during that period, should not be removed from the defendant's possession; yet the plaintiff did, on the 3d of May, 1841, take the negro out of the defendant's possession, by which the consideration of the writing obligatory had failed. The plaintiff replied, that when the negro was hired, it was agreed between the plaintiff and defendant, that if the plaintiff should want the negro, before the first day of January, 1842, the defendant should give her up, deducting twelve dollars per month for the unexpired time, and that the defendant had the negro until the 3d of June, 1841, *without this* that the plaintiff agreed that the negro should stay the whole year, as averred by the defendant; *held*, on demurrer, that replication was good in substance and form; but that the court could not, on the demurrer, render judgment final for the plaintiff, for the balance due on the note, but must award judgment, with writ of inquiry. *Ib.*

106. Pleading the general issue admits that a debt, sued for by A.

alone, was contracted with A., and not with A. and B., and it cannot be shown that it was contracted with A. and B.; so, it admits, if A. and B. sue for a debt, that the debt was contracted with A. and B., and not with A.; so, it admits, if an executor sue in his individual capacity, for a debt due his testator, that the debt belongs to him individually. *Anderson v. Tarpley*, 6 S. & M. 507. So, also, it admits that the plaintiffs, who style themselves assignees of the payee of the note sued on, which is payable to B. or order, are such assignees, and prevents the defendant from showing that the note really belonged to a bank, and thus entitle themselves to pay it in the notes of the bank. *Lanier v. Trigg*, 6 S. & M. 641.

107. A plea denying the character in which the plaintiff sues, and not supported by oath or affirmation, and where the face of the record does not evidence the truth of the plea, is not merely informal, but may be stricken out as a nullity. *Prewitt v. Bennett*, 7 S. & M. 101.

108. If a plea be defective in form, yet appropriate to the action, and going to its substance, it is error to strike it out, or reject it; it must be disposed of by demurrer. *Johnston v. Beard*, 7 S. & M. 214.

109. It seems, where a demurrer to a declaration is overruled, and the defendant offers a good plea in bar of the action, with an affidavit of its truth attached to it, such affidavit will be equivalent to an affidavit of merits, and the plea ought to be received. *Ib.*

110. The issue on a plea of *null tiel record*, is to the court, and where the judgment to which it was interposed was read to the jury,

without objection, the inference is, that the plea was disposed of, or waived by the party. *Thompson v. Williams*, 7 S. & M. 270.

111. It is error, where four pleas are filed, and issues joined to the country on two of them, and demurrer filed to the other two, to proceed to trial and judgment on the issues to the country, without any disposal of the demurrers. *Harper v. Bondurant*, 7 S. & M. 397. So, also, where a declaration has more counts than one, and the defendant pleads specially to one count, and the general issue to the other, it is error for the court, on sustaining a demurrer to the special plea, to render judgment final, without disposing of the issue. *Heyfron v. Mississippi Union Bank*, 7 S. & M. 434.

112. It seems a plea *puis darrein continuance*, in this state, is not a waiver of other pleas, previously filed. *Ib.*

113. Where a demurrer was filed to a plea, and the record did not state, in so many words, that the demurrer was sustained, but it appeared in the record that the defendant, under a judgment of *respondeat ouster*, plead again; *held*, that the record showed sufficiently that the demurrer had been sustained. *Smith v. Elder*, 7 S. & M. 507.

114. Where pleas were filed on which issues were taken, and another plea, to which a demurrer was sustained, and on a judgment of *respondeat ouster*, the defendant plead a similar plea, to which a like demurrer was filed, of which last demurrer the record showed no disposition, but the parties went on to trial on the issues made up; *held*, that the high court of errors and appeals would presume that

the parties waived the last demurrer. *Ib.*

POSSESSION.

1. See *Deed*, 16-19, as to what color of title, with possession, will constitute adverse possession.

2. Possession alone is a protection against a title obtained by fraud. *Niles v. Anderson*, 5 How. 365.

3. See *Fraud*, 13, 25, 31, as to where vendor of personalty, and grantor in a deed of trust, retain possession.

4. Possession is notice to every body, of the conveyance to, or title of, the occupant, whether it be recorded, or not. *Dixon v. Lacoste*, 1 S. & M. 70; *Halls v. Thompson*, *Ib.* 443; *Wilty v. Hightower*, 6 S. & M. 345; *Jenkins v. Bodley*, 1 S. & M. Ch. 338; *Walker v. Gilbert*, 7 S. & M. 456.

5. See *Personal Property*, 6-10, how far three years' possession of, gives title.

6. See *Gift*, 2-4; possession is evidence of ownership, until rebutted.

7. See *Release*, 1-7; as to how far possession requisite to perfect release, and what possession will suffice.

PRACTICE.

1. Defendants, separately indicted for the same assault and battery, may be tried jointly, although they may have claimed the right to be tried separately. *State v. Blennerhassett*, Walk. 7.

2. Death of usee does not abate suit. *Holt v. Briscoe*, Walk. 19.

3. See *Forcible Entry and Detainer*, 5. The justice cannot reject juryman without cause. *Lewis v. Sulcer*, Walk. 21.

4. See *Chancery*, tit. *Account*, on the subject of practice before auditors, and exceptions to their reports. *Davis v. Foley*, Walk. 43.

5. See *Writ of Error*, 1, 2, on the subject of writs of error to executions, for irregularity in their issuance. *Hicks v. Murphy*, Walk. 66.

6. It is error to permit a verdict to be rendered, without an issue, judgment by default, or writ of inquiry. *Hendricks v. Snodgrass*, Walk. 86; *Horn v. Gillock*, *Id.* 107.

7. See *New Trial*, 6, 7, 8, 9, as to the conduct of jury in taking out papers, not read on trial, and dispersing, without permission of court, and examining witness, except in open court. *Offit v. Vick*, Walk. 99; *Goode v. Linecum*, 1 How. 281.

8. After plea of payment, a judgment by default is erroneous. *Selser v. Wilkinson*, Walk. 108. So, also, a verdict, without a disposition of such plea. *Rushing v. Key*, 4 S. & M. 191; unless it be a plea purporting to file a list of offsets, and, in fact, filing none; in which case it may be disregarded. *Miller v. Brooks*, 4 S. & M. 175. If the plea filed be merely frivolous, and no answer to the action, it may be disregarded. *Shropshire v. Judge of Probate*, 4 How. 142.

9. An injunction, requested upon principles, apparently of equity and justice, should never be refused in the first instance. *Lee v. Montgomery*, Walk. 109.

10. See *Criminal Law*, tit. *Trial*,

as to effect of termination of court, before verdict against prisoner. *State v. Moor*, Walk. 134.

11. Suit against non-resident defendant in supreme court, who dies, may be revived by publication. *Dismukes v. Terry*, Walk. 180.

12. Chancellor should grant rehearing in all cases, on proper application, as his refusal to do so cannot be reviewed in supreme court. *Hoggatt v. Hunt*, Walk. 216.

13. Wager of law abolished. *Jennings v. Gibson*, Walk. 234; *Dean v. McKinstry*, 2 S. & M. 213.

14. A plea in bar is waiver of plea in abatement. *Pearce v. Young*, Walk. 259.

15. A plaintiff has a right, during the progress of a trial, to withdraw an account filed by him, and if the debits are withdrawn, the credits follow, and the defendant is not entitled to their benefit. *King v. Cooper*, Walk. 359.

16. See *Evidence*, 44, as to examination of witness after the case is through.

17. The parties to a suit may, by consent, change the venue from one circuit court to another, and are entitled to a trial in that court, where the action is not local in its nature. *Chbat v. Billingsley*, Walk. 420.

18. A refusal to grant a continuance is no ground of error. *Babcock v. Scott*, 1 How. 100.

19. See *Nonsuit*, 1, as to when verdict of jury is less than fifty dollars.

20. See *Bill of Exchange*, 22, as to judgment by default, on note.

21. See *Right of Property*, 1, as to verdict in.

22. In a criminal case the defendant who introduces no testimony

ny, is not entitled to open and conclude the argument. *Byrd v. State*, 1 How. 247.

23. See *Pleading*, 43, as to effect of pleading bad plea, after one demurrer sustained.

24. See *Judgment*, 33, as to setting aside judgment by default, on affidavit.

25. Where the parties, by pleading in short, render it impossible for the court to ascertain the nature of their pleas; the decision below on the pleading, will be presumed to be correct, and be affirmed. *Leath v. Wright*, 2 How. 774.

26. See *Parties*, 6, as to right to discontinue suit.

27. An alleged excess in interest or damages, will not be noticed by the high court of errors and appeals, unless the objection be accompanied with a correct calculation, certified by a disinterested attorney of the court, according to the rule. *Gamble v. Trahen*, 3 How. 32.

28. See *Account*, for the character of account which must be filed with declaration.

29. The high court of errors and appeals will, upon suggestion of counsel, in writing, that a case is brought up for delay, inspect the record; and if it find such to be the fact, will dismiss it; they will also dismiss a case, wherein the particular errors complained of, are not formally assigned. *Adams v. Munson*, 3 How. 77.

30. Objections not made in court below, cannot be allowed in high court. *Randolph v. Doss*, 3 How. 205.

31. A frivolous demurrer, such as that the breach to an action on a joint note, did not aver that the defendants did not jointly pay, may

be rejected by the court. *Warbington v. Norris*, 3 How. 227.

32. See *Amendments*, 1; refusal to permit new, or amended plea, no ground of error.

33. See *Judgment*, 50; when set aside on affidavit of merits.

34. If the defendant in error fail to join in error, the high court will not reverse the judgment, but will hear the cause *ex parte*. *Mayson v. Lane*, 5 How. 11.

35. See *Pleading*, 61; how far informal plea may be treated as nullity.

36. See *Pleading*, 62; demurrer may be withdrawn, and plea filed, without affidavit of merits.

37. The plaintiff sued out his writ in February, returnable to the succeeding April term; in March the legislature passed the impalance act, allowing a term to plead in; held, that the law affecting the remedy merely, would take effect on this suit. *Wood v. Buie*, 5 How. 285.

38. The circuit courts have power to fix days for pleading to causes, in, and to make rules to regulate the practice therein. *Commercial Bank of Manchester v. Galloway*, 6 How. 515.

39. A cause cannot be tried at a special term, which was not ready for trial at the previous regular term; where, therefore, the previous term was the appearance term of a cause, it could not be tried at the special term, and the verdict will be set aside. *Id.*

40. See *Judgment*, 72; for practice where demurrer to plea is overruled.

41. See *Judgment*, 78; for practice where portion of the defendants plead, and portion make default.

42. The presumption is always

in favor of the regularity, and in support of the judgment of the court below. *Briggs v. Clark*, 7 How. 457; *Robinson v. Francis*, *Id.* 458; *Smith v. Berry*, 1 S. & M. 321; *Pender v. Felts*, 2 S. & M. 535. But if the evidence on which the judgment is founded, is set out in the record, it must support the judgment, or it will be reversed. *Planters Bank v. Spencer*, 3 S. & M. 305.

43. See *Pleading*, 61, 116. Error, to take a judgment final, without disposing of demurrer, even though plea a nullity.

44. Proceedings in causes brought from justice's court are *de novo*, and without any pleadings whatever. *Wright v. Simmons*, 1 S. & M. 389.

45. If a plaintiff demur to a defendant's plea, and on the demurrer being overruled the court award a *respondeat ouster*, and the plaintiff reply over, he will not thereby waive his demurrer. *Wilis v. Ives*, 1 S. & M. 307.

46. See *Pleading*, 71, whether joint maker of a note can be joined in an action with the executor of the deceased co-maker.

47. See *Judgment*, 83; it cannot be corrected after term, without notice.

48. See *Attachments in Chancery*, 1, for practice in.

49. See *Pleading*, 72; plea in its proper place, presumed to be filed in the right time.

50. See *Pleading*, 51; for effect of non assumpsit, in admitting the character of the parties suing, and of non assumpsit, verified by oath.

51. See *Ejectment*, 13, 14; as to mode of serving declaration in, and judgment in.

52. Where no plea is filed in an action of debt, it is error to submit

the case to the jury, as upon issue joined. *McAdams v. Massey*, 1 S. & M. 660.

53. See *Variance*, as to mode of taking advantage of, between bond sued on, and one offered.

54. After demurrer overruled, the defendant cannot plead, without making affidavit of meritorious defence. *Robertson v. Banks*, 1 S. & M. 666.

55. See *Pleading*, 83; after a demurrer to plead is a second time sustained, and judgment rendered against the defendant, he may assign as error the judgment on the demurrer to his first pleas.

56. The high court can take no notice of a suggestion that the defendant below died before the judgment below was rendered against him. *Dean v. The State*, 2 S. & M. 200.

57. See *Evidence*, tit. *Depositions*. Party need not give new notice to take deposition if the first commission has failed, but may take out another commission.

58. See *Judgment*, 102; what is the practice when judgment is affirmed, about the issuance of execution thereon.

59. It is error to compel the trial of a case at an earlier day than that at which it was set down for trial, by the clerk. *Fall v. Commissioners of the Sinking Fund*, 3 S. & M. 127.

60. It is too late, at a subsequent term of the probate court, to apply for a rehearing. *Scott v. Searles*, 5 S. & M. 25.

61. See *Nonsuit*, 3. If pleadings at the second term are not perfected *instantly*, the court may *nonsuit* the plaintiff.

62. Where a circuit judge, who takes a motion under advisement, and does not return his decision

within the four months required, the motion will be considered as having expired with the term. *Puckett v. Graves*, 6 S. & M. 384.

63. Where a demurrer to a declaration is overruled, and the defendant offers a good plea in bar of the action, with an affidavit of its truth attached to it, such affidavit will be equivalent to an affidavit of merits, and the plea ought to be received. *Johnston v. Beard*, 7 S. & M. 214.

64. See *Pleading*, 111; as to proper judgment, when there are other issues, either of law or fact, undisposed of, besides that on which the court or jury pass.

PRINCIPAL AND AGENT.

See *Agent*, 1, as to how far acts of, bind principal. *Landsdale v. Shackelford*, Walk. 149; and see *Agent*, generally.

PRISON BOUND BOND.

1. Where the statute requires prison bound bonds to be made payable to the plaintiffs in the execution, one payable to the marshal of the United States, would be void. *Winchester v. Collins*, Walk. 535.

2. The discharge of a prisoner who has given a prison bound bond, under the insolvent laws of the state, is not a good defence to the bond. *Offutt v. Bowen*, Walk. 545.

PROBATE COURT.

1. Clerks of, how removed. See

Constitution of State, 2. *Runnels v. The State*, Walk. 146.

2. See *Certiorari*, 2; for power of probate judge to grant.

3. Probate court may compel obedience to its orders, by attachment. *Moore v. Judge of Probate of Adams Co.* Walk. 310.

4. The probate court cannot surcharge and falsify an account settled by a final decree of the county court. *Gibson, ex parte*, Walk. 377.

5. See *Executor and Administrator*, 19; as to the duty of making probate of claim and having it allowed by probate court.

6. The decree of the probate court where it has jurisdiction of person and thing, is conclusive as to the world until reversed. For its jurisdiction in allowing debt due executor by testator, see *Executor and Administrator*, 51; and *Gildart v. Starke*, 1 How. 450. The decree of the probate court in the settlement of administrations on estates, being final where due notice according to the statute is given, where an estate has been finally settled by the court, the settlement cannot be set aside or opened by bill in chancery for an alleged mistake in the settlement; the decree of final settlement regularly made is final and conclusive, and can only be set aside, or opened for fraud. *Griffith v. Verner*, 5 How. 736. The same rule prevails with reference to the accounts of guardians; their final settlements cannot be set aside at a subsequent term for alleged mistakes. *Hendricks v. Huddleston*, 5 S. & M. 422.

7. See *Executor and Administrator*, 49, for jurisdiction of probate court, and below, 8.

8. The 4th Art. § 18, of the

constitution, provides "that a probate court shall be established in each county of this state, with jurisdiction in all matters, testamentary and of administration, of orphan's business, and the allotment of dower, in cases of idiocy and lunacy, and of persons *non compos mentis*;" the 16th section, provides that, "a separate superior court of chancery shall be established with full jurisdiction in all matters of equity;" on a bill being filed in the superior court of chancery to review, in a matter of administration, the proceedings of the probate court; *held*, that the court of chancery had no jurisdiction of the subjects confided to the probate court; the jurisdiction of the latter court, was ample and *exclusive*, and the bill must be dismissed. *Blanton v. King*, 2 How. 856; *Carmichael v. Browder*, 3 How. 252; but if there be no administration, a court of equity will have jurisdiction, as where the widow takes possession of the property without administering, and uses it, the heirs and devisees may sue her in equity. *Farve v. Graves*, 4 S. & M. 707.

9. See *Dower*, 9-11; for jurisdiction in allotment of dower.

10. See *Chancery*, 141, 142; for the respective jurisdictions of the probate and chancery courts in matters of probate jurisdiction.

11. The pleadings in the probate court are not required to be as rigid as in a court of chancery; yet if fraud be charged in a bill in the probate court, seeking to impeach one of its own decrees, the charge must be answered; as fraud vitiates everything. *Hurd v. Smith*, 5 How. 562.

12. The probate court has power at a subsequent term, to set aside

its own decrees obtained by fraud, or for other cause. *Ib.* But *quære*, it is doubtful. *Smith v. Hurd*, 7 How. 188. It seems it cannot. *Ib.*; *Smith v. Denson*, 2 S. & M. 326; it may at the term to which the report of the sale is returned. *Planters Bank v. Neely*, 7 How. 80; it cannot at a subsequent term. *Turnbull v. Endicott*, 3 S. & M. 302.

13. A decree of the probate court to sell the realty of a decedent, is void, without the notice required by statute being first given. *Campbell v. Brown*, 6 How. 106; *Ib.*, 230; yet if a purchaser at such sale object that the necessary notice was not given, he must produce the record. *Smith v. Denson*, 2 S. & M. 326.

14. See *Executor and Administrator*, tit. *Sale by*; for power of probate court to set aside sale, for fraud.

15. The loss of a bill of exceptions is no ground for granting a rehearing in the probate court, at a term subsequent to that at which the decree was rendered. *Planters Bank v. Neely*, 7 How. 80.

16. The court of probate has *exclusive* jurisdiction to award an issue of *devisavit vel non*. *Hamberlin v. Terry*, 7 How. 143.

17. The probate court has no jurisdiction to enforce an attorney's lien on a decree, rendered in that court, for the payment of money. *Clarke v. Ratcliffe*, 7 How. 162.

18. See *Chancery*, 131; when the probate, and when the court of chancery, will have jurisdiction of suit by distributees to recover property of intestate; if the administrator is the only party, the court of probate will have sole jurisdiction.

19. See *Executor and Administrator* tit. *Commission of Insolvency*; for power of probate court

to open commission of insolvency, when once closed; and power to inquire into, and alter its own decrees, after the term when they were rendered has elapsed.

20. The probate court has full jurisdiction to allot dower. *Caruthers v. Wilson*, 1 S. & M. 527.

21. A writ of error to the probate court, is demandable as a writ of right. *Green v. Whiting*, 1 S. & M. 579.

22. The probate court of this state, cannot exercise jurisdiction over a guardian, appointed by the courts of a different state, nor can it entertain a petition by such guardian, for a final settlement of his guardian accounts. *Bell v. Suddeth*, 2 S. & M. 532.

23. See *Pleading*, 86; a multifarious petition in probate court, cannot be maintained.

24. Whether a probate court has jurisdiction of a bill of review? *Quere. Alexander v. Smith*, 4 S. & M. 258. It has not: *Harris v. Fisher*, 5 S. & M. 74; *Cowden v. Dobyins*, 5 S. & M. 82; *Farmers and Merchants Bank v. Tappan*, 5 S. & M. 112; *Washburn v. Phillips*, 5 S. & M. 600; *Searles v. Scott*, 6 S. & M. 246.

25. An appeal or writ of error does not lie from an interlocutory order of the probate court, where no final judgment has been given; where, therefore, commissioners of insolvency have reported upon the estate of the decedent, and the court under the statute, refers a rejected claim to referees, such order of reference is a mere interlocutory order, and cannot be made the subject of appeal, or writ of error; it is besides a discretionary matter with the judge to make the reference, and error

therefor will not lie for the exercise of the discretion. *Regan v. Stone*, 4 S. & M. 691.

26. The probate court cannot grant an injunction; to do so is peculiar to a court of chancery. *Scott v. Searles*, 5 S. & M. 25.

27. Where exceptions to an answer in the probate court, were overruled at the April term, 1843, and at the June term of the same year, a motion for a rehearing was made; held, that the motion came too late and should be overruled. *Ib.*

28. An administrator of a deceased partner has no remedy in the probate court, by partition or otherwise, against the surviving partner, who has a right to the possession and control of the partnership effects; his remedy for the surplus of the partnership property, after settlement of the partnership liabilities, is either an action of account or bill in equity; the probate court will, therefore, have no power to compel a surviving partner to discover the amount of partnership effects in his hands, at the suit of the administrator of the deceased partner. *Ib.* Nor will the probate court have jurisdiction of a petition against such surviving partner and a trustee, to whom the partnership effects have been transferred. *Searles v. Scott*, 6 S. & M. 246.

29. The probate court has no jurisdiction of a bill to correct the general course of administration, by having accounts and reports disallowed, which the court had formerly approved; the objections should have been made to the reports and accounts when allowed. *Harris v. Fisher*, 5 S. & M. 74.

30. In 1843, various creditors of the estate of B., deceased, filed a bill in the probate court against the administrators of B., alleging that

B., at the time of his death, had property sufficient to pay all his debts, and that it had come to the hands of his administrators who had improperly used the assets, and, in the year 1838, had fraudulently procured a declaration by the probate court, of the insolvency of the estate; that the account upon which the declaration was made was erroneous upon its face, in showing that a large amount of debt had been paid before the declaration made; that all the debts reported were not those of the deceased; that a large amount of the assets had been used by the administrators, who had paid preferred creditors large sums, and one of them had retained a large sum due himself; that in 1839, the administrators, without notice and in vacation, had made an erroneous settlement with the probate court, in which were contained unauthenticated and barred claims; they prayed that the administrators might account for the assets, and pay the creditors if the estate were solvent, if not, their *pro rata* proportion; held, that the probate court had no jurisdiction of the bill. *Ib.*

31. In the absence of statutory directions, the modes of procedure adopted by the ecclesiastical courts of England are necessarily in force in our own probate courts. *Cowden v. Dobyns*, 5 S. & M. 82.

32. Where the probate court has full jurisdiction of a matter, its judgment is final and cannot be disturbed, unless fraud is charged and proved; where, therefore, an executor, had given due notice according to the statute, presented his account and vouchers for final settlement and allowance, and the judge had examined, stated and reported his account for allowance

and discharged the executor; the judgment of the court was held conclusive evidence that the proper vouchers had been filed, unless the judgment was impeached for fraud. *Stubblefield v. McRaven*, 5 S. & M. 130; *Jones v. Coon*, *Ib.* 751.

33. See *Executor and Administrator*, tit. *Who may administer*; for power of probate court to remove administrator without notice; to force him to give new security *in vacation*; or to issue an order to the sheriff to take the intestate's property out of his possession.

34. Where an issue has been made up in the probate court and sent to the circuit court for trial before a jury, upon the rendition of the verdict, the issue must be sent back to the probate court for judgment; and if the circuit court undertake to render a judgment upon such verdict, it will be a nullity; and no appeal or writ of error can, therefore, lie therefrom, and if one be prosecuted, it will be dismissed; if when the issue, after the verdict has been sent back to the probate court, that court refuse to grant a new trial, the whole proceedings may be brought up to the high court of errors and appeals for revision in all their parts. *Wallace v. Wingate*, 6 S. & M. 151.

35. See *Executor and Administrator*, 99; probate court has jurisdiction of petition by one administrator against his co-administrator, to compel the latter to inventory property of the estate, claimed by him as his own.

37. The probate court has no power to appoint an administrator *ad colligendum* where there is one in chief. *Searles v. Scott*, 6 S. & M. 246.

38. See *Evidence*, 199; for mode of taking down oral testimony in

probate court to be used in high court.

39. The probate court has no jurisdiction of a bill filed by the assignee of an open account against the assignor, and the administrator of the administratrix of the debtor in the open account, to compel the administrator to pay the account to the assignee, on the ground that the administratrix, in her life-time, had promised the payment of it to the assignee, provided the account should be allowed to her in the settlement of her intestate's estate, and alleging that it had been so allowed; but the administratrix had not paid it, and the assignor claimed it as being due to him. *McCoy v. Rhodes*, 7 S. & M. 296.

PROCEDENDO.

The writ of *procedendo* lies only where there has been a neglect or refusal of justice by an inferior court; on the simple dismissal of an appeal, therefore, from the special court of justices, trying an action of forcible entry and detainer, such a writ will not be ordered. *McGilvry v. Jackson*, 4 How. 245.

PROCESS.

1. Process must be signed either by the clerk of the court, or by his deputy in the name of the clerk: *Felder v. Meredith*, Walk. 447.

2. See *Waiver*, 1. How far defect in process waived by recital in record.

3. A defendant may acknowledge service of process, but the court should not render judgment by default, thereon without being satisfied by proof of the handwriting

of the defendant, in the acknowledgment of the service, by a witness. *Harvie v. Bostic*, 1 How. 106; *Davis v. Jordan*, 5 How. 295; *Bozman v. Brower*, 6 How. 43.

4. A sheriff's return, on process, is conclusive of the fact, but where the return is made by another, it must be proved. *Ib.*

5. Process which does not issue prior to five days before the term of the court next after its issuance, should bear test of the *preceding* term, and be returnable to the next succeeding that to be held at the expiration of the five days. A plea in abatement therefore to a writ that it does not bear test of the term preceding that to which it is *returnable*, should also state that it was not issued within five days of the term preceding its return term. *Hurst v. Strong*, 1 How. 123.

6. The writ of *capias ad respondendum* is part of the record, and a variance between it and the declaration may be taken advantage of as well by demurrer as by plea in abatement; and where the declaration is in covenant, and the process in debt, the variance will be fatal. *Gilleland v. Wilkins*, 1 How. 574; but not after judgment by default. *Shrock v. Bowden*, 4 How. 426.

7. A return on process, of "executed by copy," is sufficient evidence of legal service. *Keithley v. Fisdale*, 2 How. 683; *Claiborne v. Planters Bank*, *Ib.* 727. Court will not question the legality of the return "executed." *Smith v. Cohq*, 3 How. 35.

8. It is no objection to process, that it is not signed by the clerk with his own proper hand; if it is issued with the clerk's consent and approbation, it is sufficient. *Gamble v. Trahen*, 3 How. 32.

9. A return on a writ, of "executed by leaving a copy at the boarding-house of the defendant," is insufficient service. *Smith v. Cohea*, 3 How. 35; so also the return, "executed by leaving a copy at defendant's house;" the statute requires, where the service is not personal, that the writ should be left with a free white member of the family, over sixteen years of age, or in the absence of such, in some public place about the house; and where the return shows that the service was not personal, it must show that the requirements of the statute were complied with. *Fatheree v. Long*, 5 How. 661; therefore this is an insufficient return, "executed on C. by leaving a copy at his residence, on a table in the porch, he not being found at home." *Tomlinson v. Hoyt*, 1 S. & M. 515. So also this, "executed by leaving a copy at her residence, the said E. not being at home, nor any white person over the age of sixteen years being at the said residence." *Eskridge v. Jones*, 1 S. & M. 595.

10. The indorsement required by the statute on the writ, of the cause of action, is designed merely to give the party defendant notice thereof; where it is sufficient for that purpose, it will be valid; where, therefore, the indorsement described a note in other respects correctly, as payable at one bank, when in fact it was payable at another, held, to be sufficient. *Walker v. Tunstall*, 3 How. 259.

11. The indorsement of the cause of action required, by law, to be made on the writ, is to give notice merely of what is sued for, and the verdict of the jury may exceed the amount claimed by the indorsement, if it do not exceed the damages laid in the declaration. *Lynch v. Com-*

missioners of Sinking Fund, 4 How. 377.

12. Judgment without service of process or appearance entered, is void. *Ayer v. Bailey*, 5 How. 688; *Prentiss v. Mellen*, 1 S. & M. 521; *Graves v. Williams*, 2 S. & M. 286.

13. Where writs were sent to different counties, in the same suit, and the clerk of the county where the suit was brought indorsed on the writs, on which defendants the respective sheriffs were to serve them, though the writs in their body named all the defendants, if one of the writs be returned "executed," generally it will be considered as applying only to those whom the sheriff was directed to serve it upon. *Bozman v. Brower*, 6 How. 43.

14. The writ of *capias ad respondendum* is part of the record, and if there be a variance between the writ and declaration, it may be taken advantage of by plea in abatement. *Walker v. Walker*, *ib.* 500.

15. See *Ejectment*, 13, for service of process in.

16. Where process is made returnable to a wrong term of the court, it is amendable on motion; it is a sufficient notice of the action, if the defendants served with it appear and move to quash the writ for such defect; the appearance will remove the necessity for amending it. *Harrison v. Agricultural Bank*, 2 S. & M. 307.

17. A mistake in the indorsement on the writ in the date of the note sued on, does not vitiate the writ. *Pharis v. Conner*, 3 S. & M. 87; it is sufficient, if the indorsement show the amount of the note sued for. *Fall v. Com. of Sinking Fund*, 3 S. & M. 127.

18. A writ without a seal of the court, or a statement that there is

no seal, if there be none, is bad, and the objection may be taken by plea in abatement. *Ib.*

19. See *Amendment*, 8; when *mesne* and final process amendable.

20. See *Partner*, 21; process executed on one partner not notice to the other, and the return must show distinctly notice to all.

21. See *Abatement*, 11. It is a good plea in abatement, that the process does not show the amount actually demanded, and it is in the discretion of the court to allow an amendment of the writ.

22. The service of a writ by a different deputy sheriff from the one specially deputed to serve it, will be good. *Henry v. Halsey*, 5 S. & M., 573.

23. See *Mortgage*, 22; the voluntary discharge of a debtor arrested on *mesne* process, does not affect lien of mortgage previously given by such debtor; it would be otherwise if the discharge were on final process.

24. By the law regulating the territory of Mississippi before it was made a state, chancery jurisdiction was conferred on the supreme court, which was a court of general jurisdiction, and the sheriff its officer, who was bound by law to execute its process; where, therefore, such sheriff returned the process on a bill filed in that court to foreclose a mortgage, "*served*," and a decree was rendered thereon, *held*, that the process and return were sufficient to uphold the de-

cree. *Smith v. Bradley*, 6 S. & M. 485.

25. Where there has been a defective return upon process, it is a question of error, or not in rendering the decree; and that decree cannot on account of such defect, be attacked collaterally in an action of ejectment against parties claiming under the decree. *Ib.*

26. Process against L. S. Jr., returned "executed on L. S." will be presumed to have been served on the right person until the contrary is made to appear. *Sanders v. Dowell*, 7 S. & M. 206.

PROSECUTOR.

1. See *Assault and Battery*, 1, 2. Not compelled to abandon civil suit or prosecution; is competent witness, though liable for costs if prosecution frivolous. *State v. Blennerhassett*, Walk. 7.

2. See *Criminal Law*, tit. *Indictment*. Name of, must be marked on indictment.

PUBLICATION.

Suit against deceased non-resident defendant, may be revived by publication, in high court of errors and appeals. *Dismukes v. Terry*, Walk. 180.

See *Chancery*, tit. *Publication*.

RAILROADS.—

See — ^{R.}franchise

1. If the owner of land, through which a company wishes to run a railroad, agree to refer to arbitrators the question of damages to be paid by the company for the right of way, and there be no express agreement that time shall be given for the payment of the damages awarded, the damages must be paid before the right of way can vest in the company. *Stewart v. Raymond Railroad Company*, 7 S. & M. 568.

2. He who seeks to compel a specific performance of a contract, must do all that is incumbent upon him, or he cannot succeed; where therefore, a railroad company agreed with the owner of land to refer to arbitrators the question, how much the company shall pay him for the right of way over his land, they cannot prevent him from the exercise of full ownership over the land until they have paid or tendered to him the damages awarded. *Ib.*

3. A purchaser of land, who, at the time of purchase, executed a deed of trust to secure the purchase-money, cannot convey to a company even an easement over the land, except subject to the payment of the purchase-money; where therefore, such a purchaser did convey to a company an easement over the land, and the land was subsequently sold under the deed of trust; and the purchaser at the trust sale agreed with the company to refer to arbitrators the question of damages, which they should pay him for the enjoyment of the easement, it was

held that the company was not entitled to an indefinite credit for the payment of the damages awarded, and to the enjoyment of the easement until the payment of the money, but they were bound to pay or tender the amount of damages before they could have any right to the enjoyment of the easement. *Ib.*

4. The doctrine in regard to the dedication of land to public uses, has no sort of application to that class of cases arising out of the right of a railroad company to run their road through land without first paying the owner thereof the damages awarded to him for their so doing. *Ib.*

5. Whether the road of a railroad is subject to sale under execution at law, query? *Ib.*

6. Where a railroad company neglects to pay the owner of the soil, the damages awarded him for their right of way through his land, and he is exposed to the transit of the cars of the company over his land for an indefinite period, with but little prospect of compensation, a court of equity can grant him an injunction, restraining the company from the use of the land. *Ib.*

7. A railroad built by an incorporated company for public travel and transportation, is a mere franchise, and not assignable by the Company. *Robins v. Embry*, 1 S. & M. Ch. 207.

8. See *Assignment for benefit of creditors*, 1-19; for assignment by a bank to which a railroad by its charter was affixed, and the effect and requisites thereof.

REAL ESTATE.

1. Recitals in a deed, notice to purchasers, of defect in title therein disclosed. *Chew v. Calvert*, Walk. 54.

2. A person standing by, in silence, at the sale of his real estate, does not forfeit his right, if purchaser knew of his title, otherwise. *Ib.*

3. Where there is a deficiency in land sold, an injunction should be granted against the collection of the purchase-money. *Simmons v. Lard*, Walk. 159.

4. Under contract to convey title to land, with tender of a deed by vendor, and possession taken by vendee, the vendee cannot rescind the contract for a want of a good title in his vendor at the time of sale, where the vendor has subsequently procured and tendered a good title. *Gale v. Green*, Walk. 159.

5. Where B. is in possession of land, and A. represents it as embraced within the survey of a tract belonging to A., and threatens to oust B. if he do not purchase A.'s right, which B. accordingly does for cash, if it afterwards is made manifest that the land is not embraced by A.'s claim, a court of chancery will rescind the contract, and decree a restoration of the purchase-money, though it be not proved that A. was cognizant of the fact, that the land was not embraced by his claim. A contract may be rescinded, on proof of mutual error, as well as of fraud. *Harrison v. Stowers*, Walk. 165.

6. Administrator, no right to possession of real estate. *Carmichael v. Davis*, Walk. 221.

7. A. sells land, to which he has

not good title, and gives bond for title to B., who knows of the defect in A.'s title; there being no fraud, and B., not evicted, nor threatened with eviction, cannot withhold the purchase-money. *Miller v. Owens*, Walk. 244.

8. The purchaser at sheriff's sale of a tract of land, for which the defendant in the execution had only a bond for title, on payment of the purchase-money, takes it, subject to the lien, for the unpaid purchase-money. *Meade v. Thompson*, Walk. 450.

9. See *Land Laws*, 6, and *Chancery*, 38; as to inquiry of chancery over fraudulent patentee of government.

10. A court of law cannot inquire into, and enforce a parol contract for the sale of land, although performed in part by delivery, of possession. *Payson v. West*, Walk. 515.

11. Where there is a bond for title to land given, and the promise to pay the purchase-money is independent of the covenant to make title, the vendor may maintain his action for the purchase-money, without having executed or offered to execute a deed to the land; as where the first note for the purchase-money falls due before the title is to be made. *Hageman v. Sharkey*, 1 How. 277; *Leftwich v. Coleman*, 3 How. 167; *Rector v. Price*, 3 How. 321; *Hazlip v. Noland*, 6 S. & M. 294; *Gibson v. Newman*, 3 How. 341; nor can the vendee obtain a rescission of the contract, where he is in possession under a title-bond, and has agreed to pay the money before title is made, and there was no fraud in vendor and no eviction. *Coleman v. Rowe*, 5 How. 460; *Anderson v. Lincoln*, 5 How. 279; *Green v.*

Finucane, 5 How. 542. See *infra*, 50.

12. In an action for the purchase-money of land sold, for which a bond for title in fee simple was given, the plea that the vendor had represented that he was lawfully seized and possessed of the land at the time of sale, and was by law authorized to sell the same, and had promised to convey the title in fee simple, in consideration of which representations and promise the note had been executed, but that in fact these representations were untrue, and the reverse the truth, and the land was at the time in the adverse possession of another, and known to be so by the vendor; is not a good plea; it does not plead *facts* but matters of law, and does not aver fraud in the vendor; which must not be left to matter of inference, but must be directly charged. *Ib.* 1 How. 341.

13. The vendor need not have title when he contracts to sell, if he give bond for title, it will be sufficient if he have it when he is bound to make conveyance; and a plea that he had no title when the contract of sale took place, without averring that he had it not when the plea was pleaded, will be bad. *Ib.*

14. See *Chancery*, 306; as to resulting trust in grantee; who has taken the legal title to secure to him a sum of money.

15. See *Commons*, 1, 5; as to dedication of real estate; and see *Partition*, 1; as to who must be parties to petition for partition.

16. See *Executor and Administrator*, tit. *Sales by*; as to how far purchaser at executor's sale without warranty, can set up defect in title, as an excuse for not paying purchase-money, and *Scire Facias*

4; the necessity of revival of judgment against heirs to sell land of ancestor.

17. Where A. contracted to sell lands to B., by assigning the certificates of certain sections and parts of sections of land, describing the number of sections, parts of sections, township and range, and the number of acres, according to the certificates of entry at the land-office, and put B. in possession, and it turned out on a re-survey, that the lands thus sold did not come up, by one hundred and fifty acres, to the amount called for by the certificates of entry; *held*, that A. was not liable for the deficiency, and B. could not avoid payment of the purchase-money. *Moore v. Vick*, 2 How. 746.

18. Where A. contracts to sell B. a piece of land, and informs him that the title is to come through C., and B. accepts a deed from C., to the land, expressing a less consideration than he agreed to pay A., he cannot afterwards object to the payment of the purchase-money, nor force C. to increase the warranty as to quantity expressed in the deed. *Leonard v. Austin*, 2 How. 888.

19. See *Trust Estate*, 7; for what interest in real estate the subject of grant; and when the holder of the legal title declared a trustee for the beneficial owner.

20. See *Evidence*, 79, 80, 88; for admissibility of surveys of land, in evidence.

21. Where metes and bounds and courses and distances are called for by description in a grant, the quantity of land embraced is immaterial. *Martin v. King*, 3 How. 125.

22. The question which shall prevail, course or distance, in a

grant, depends on the circumstances of each particular case; where an adherence to distance will leave an open line, course must be preferred, for it is an universal rule that a survey must be closed. *Ib.*

23. The mere *figure* of a map attached to a grant, will not control the calls for courses and distances on it; in all grants, certain proof of the lines, is the best evidence of identity; in the absence of that, fixed monuments and marked lines are the next best evidence; in the absence of these, courses and distances must govern, and where they conflict, the map may be called in to aid in ascertaining the location. *Ib.*

24. See *Deed*, 13; void for uncertainty as to land sold.

25. See *Deed*, 16-19; as to what color of title with possession, constitutes adverse possession.

26. Where lands were subject to preemption, and also to private entry by law; and in order to prevent confusion the secretary of the treasury, required the registers to exact of applicants for entry, affidavit that the land they proposed entering, was not subject to a preemption right, and the register permitted an entry to be made without such affidavit, that alone will not vitiate the entry, in favor of a preemption claimant to the land. *Carter v. Spencer*, 4 How. 42.

27. Where, by act of congress, with reference to preemptions, and the rules of the secretary of the treasury on the same subject, directory to the registers, it was provided that when a settlement was made on the corners of the sections, the preemption should be confined to that section where there was the largest improvement; C. filed his bill, claim-

ing a preemption in a certain section, and alleging that *one-third* of his improvement was in that section, and the residue in *adjoining lands*, held, that C. did not bring himself within the act and rule, because he did not show that his *largest* improvement was in the section he sought to locate his preemption. *Ib.*

28. See *Execution*, 19; how far variance between judgment and execution vitiates sheriff's sale.

29. See *Forcible Entry and Detainer*, 8; how far possession of vendee, who has not title till he pays the purchase-money, is adverse to the vendor.

30. Where the act of congress of 1803, gave a right of preemption in a certain district of country, restricted to lands not *claimed by virtue of any British grant*, and making it the duty of the commissioner, issuing certificates of entry, to state whether such British claim exist; before he grants a certificate; if the commissioners grant an unconditional certificate it will not be permitted to interfere with a claim under a British grant; the British claimant will still hold, in preference to the certificate of entry, especially if the preemptioner has all the land his certificate calls for, without conflicting with the British claim. *Vick v. Peck*, 4 How. 407,

31. See *Chancery*, tit. *Fraud*, for rescission of contract as to realty, for fraud in vendor.

32. See *Fraud*, 10; how far representations known to be false by vendee, are fraudulent as to him.

33. See *Chancery*, 147; no relief for defect in title, granted prior to eviction.

34. The possession of real estate

is, of itself, protection against a title obtained in fraud. *Niles v. Anderson*, 5 How. 365.

35. See *Executor and Administrator*, tit. *Sales by*; sales of decedent's estates by administrators, pass no title to vendee, unless the decree of the probate court is made up, on the proper notice required by statute.

36. The vendee of land, in order to protect himself from an adverse title, as an innocent purchaser, without notice, must not be a mere volunteer; he must have paid a valuable consideration. *Doss v. Armstrong*, 6 How. 258.

37. Vendor's equitable lien does not pass to his assignee of the note for the purchase-money. *Briggs v. Hill*, 6 How. 362.

38. See *Chancery*, 269. Where vendor of land has given title bond and taken notes, with surety, and assigned them, his assignee cannot subject the land to the note.

39. In the case of dependent covenants for the purchase of real estate, where the vendee seeks to enjoin a collection of the purchase-money until he gets title, he must tender the purchase-money, and demand a deed; if the vendor fail to give it the vendee will be entitled to relief. *Harris v. Bolton*, 7 How. 167. So, also, in a suit at law against the obligor in a title bond to make title when the purchase-money is paid, the plaintiff must show that the purchase-money has been paid, before he can recover. *Stockton v. George*, 7 How. 172.

40. See *Fixtures*, 1. Where one has built a house on the land of another he may remove it.

41. See *Vendor and Vendee*, 11-17; what fraud will entitle to rescission of contract.

42. See *Contract*, 47; vendee, by non-compliance with his own contract, cannot entitle himself to a rescission thereof.

43. See *Vendor and Vendee*, 19; right of vendor who has given a bond for title, to subject the land to pay the purchase-money.

44. See *Execution*, 54. *Sci. fa.* cannot issue against heir or a judgment against executor.

45. See *Executor and Administrator*, tit. *Sales by*; a sale under private act of the legislature good, if the act be strictly complied with; void, if not; the purchaser will be allowed for improvements as a set-off against rents.

46. See *Vendor and Vendee*, 21; for right to rescission of contract of sale, where bond for title given.

47. See *Will*, 25; whether power given to executor to sell all testator's real estate, at his discretion, converts thereby the realty into personalty.

48. See *Consideration*, 21; whether a covenant to deduct from the purchase-money of land, is a real covenant, and passes with the land. Whether the purchaser, when sued for the purchase-money, may not set up a failure of consideration to the extent of failure of title.

49. See *Execution*, 60; the interest of the vendee of land, who has only a bond for title, but who has paid the purchase-money, is subject to seizure and sale under execution at law; otherwise, where all the purchase-money has not been paid.

50. Courts will construe covenants to be dependent, unless a contrary intention clearly appear; in an action, therefore, on a note given for land to which the vendee received a bond for title, to be made

when the purchase-money was paid, and that was payable in instalments; the right to enforce payment is not distinct and independent of the ability to make title, and the defendant may set up and show in bar of the action on the note, a want of title in the vendor. *Peques v. Mosby*, 7 S. & M. 340. See *supra*, 11-13.

51. A covenant of general warranty, binding the grantor and his heirs in a deed of bargain and sale of real estate, is a real covenant, running with the land, and enures to the benefit of all subsequent purchasers. *Torrey v. Minor*, 1 S. & M. Ch. 489.

RECOGNIZANCE.

1. See *Variance*, 5, for fatal variance between *sci. fa.* and recognizance.

2. See *Criminal Law*, 37, 38, as to when sheriff may take, and when notice of application for forfeiture must be made.

3. See *Criminal Law*, 44-47, for what sufficient recognizance.

4. At a court holden on the third Monday in March, a judgment was rendered on a recognizance made returnable to the third Monday after the fourth Monday in April, the legislature having, in the mean time, changed the court from the latter to the former time; the judgment was *held* to be correct. *McEwin v. The State*, 3 S. & M. 120.

5. Where a party was indicted in four different cases, at the same term of the court, and recognizances were given in each case, which were severally forfeited, and the clerk recited the forfeiture as having occurred "in these four cases," without specifying which

cases, or their titles, or identifying them in any way; *held*, to be error. *Overaker v. The State*, 4 S. & M. 738.

6. Where a sheriff executes a bench warrant, if he take bail he should so state it, and return the facts in full to the court; and if he return a bench warrant "*executed*," and say nothing of any recognizance, or bail taken by him, the mere fact that a recognizance is recited in the record, there being nothing to connect it with the case but its own recitals, will not be sufficient to uphold a judgment for a forfeiture upon it. *Ib.*

RECORD.

1. Where the record is so defective, that the true state of the pleadings and the action of the court below, cannot be ascertained, the presumption will be in favor of the correctness of the inferior court. *Leath v. Wright*, 2 How. 774.

2. The notes of the judge on the docket are no part of the record, and the record cannot be amended by them at a subsequent term. *Dickson v. Hoff*, 3 How. 165; *Burney v. Boyett*, 1 How. 39. *Russell v. M'Dougall*, 3 S. & M. 234.

3. The process which brings the defendant into the high court of errors, the transcript of the record, excepting depositions in chancery suits, the assignment of errors and joinder in error, all the orders and the final judgment of the court, constitute the papers for final record in a high court. *Officers of Court v. Fisk*, 7 How. 403.

4. Where the record is itself contradictory in its parts, that construction must, if practicable, be adopted which will make it sensible and

consistent, and not one which is wholly absurd and will preclude relief; as where the bill of exceptions recites that a judgment, on a motion, for the *defendant*, was entered at the instance of the *plaintiff*, and the judgment itself recites that it was made on motion of the defendant, the latter recital will prevail. *Wooten v. Wingate*, 6 S. & M. 271.

5. Every motion made in a cause is a part of the record, as much so as the declaration, plea or judgment. *Puckett v. Graves*, 6 S. & M. 384.

REGISTRATION.

1. See *Deed, passim*.

2. See *Judgment*, 108; mortgage takes date of lien, from date of registration.

REHEARING.

1. See *High Court of Errors and Appeals*, 14; may be granted in extreme case, after the term has expired.

2. In the probate court, it is too late, after the term has passed, to move for a rehearing. *Scott v. Searles*, 5 S. & M. 25.

RELEASE.

1. A deed which purports "to remise, release and quit claim" title to land, is competent testimony on behalf of the releasee therein; for even though the words be not sufficient to pass an *entire* estate in land, yet they are sufficient to perfect a title in one having claim of title; and therefore as a link in the chain of title, depending for its

effect on other instruments or evidence, and as a constituent part of title, such deed is competent evidence. *Sessions v. Reynolds*, 7 S. & M. 130.

2. It seems that a mere release of title to land does not bar the right to land of which another person is in the actual visible possession, claiming a right; yet it may be used as a conveyance of the estate to one in possession; or as a mean of transferring or enlarging an estate by giving some new interest; or as perfecting an imperfect and defeasible estate; and it seems that any interest in the person to whom the release is made, either by possession, or in deed, or in law, in his own or another's right, any vested interest even, without actual possession, will be a sufficient foundation for the release to stand upon. *Ib.*

3. In a country abounding in wild land, a deed or grant is a constructive possession in the grantee, sufficient to uphold a title derived by release from one having title to the land. Where therefore the Spanish government granted the same land, first to R. and afterward to F., and R. subsequently released to F. the constructive possession of F. under his grant, will be sufficient to uphold the release from R. *Ib.*

4. Where a release of title to land was thirty-five years old, it was held to be of an age to draw to its support the favorable presumptions of law that it was operative at the time of its execution; which presumption is supported by proof of the possession of the releasee as far back as there is any evidence of possession. *Ib.*

5. The title to the whole of a tract of land, with possession of

part of it, is a possession of the whole of it, and will support a release of title to the whole. *Ib.*

6. In order to defeat a release it seems there should be proof of an actual adverse possession under a claim of right; therefore, where the releasee was in possession long before there was any adverse claim, and, for anything that appeared to the contrary, was in possession when the release was made, it was held that the release would be operative. *Ib.*

7. The objection to a release on the ground of the want of possession, or other interest in the releasee at the time of its execution, loses much of its force when made in the high court of errors and appeals, for the first time, and when the objection made to its admissibility in the court below, was as to its authenticity. *Ib.*

8. See *Surety*, 29; release of one is not a release of all.

REMITTITUR.

1. See *New Trial*, 11; as to when *remittitur* removes ground of new trial.

2. A *remittitur* of excessive damages may be made by counsel. *Pickett v. Ford*, 4 How. 246; so, also, where the judgment is for a greater sum than the damages laid in the declaration, he may remit the excess. *Hurd v. Germany*, 7 How. 675.

3. The plaintiff in a forthcoming bond may enter a *remittitur* for an excess, on the hearing of a motion to quash the bond for such excess. *Ridgeway v. Marshall*, 5 How. 286.

4. Where a deposition establishing a payment of fifty dollars, has

been improperly excluded from the jury, if the plaintiff will enter a *remittitur* of that sum with interest, the high court will not send the case back, but will render a judgment for the balance. *Anderson v. Tarpley*, 6 S. & M. 507.

REPLEVIN, AND REPLEVIN BOND FOR RENT.

1. See *Landlord and Tenant*, 1; where tenant replevies, and landlord gets verdict for less than he claims, tenant not liable to double damages. *Terrell v. Ligon*, Walk. 170.

2. A party who claims property levied on under distress for rent due by another, and sues out his replevin therefor, is not liable to pay double the amount of rent due, unless he actually got possession of the property by virtue of his writ of replevin; and where he failed to do so, it will be error to make up an issue and try the question of right, and, on the verdict being against the claimant, to assess double damages. *Punchard v. Rundell*, 1 How. 508.

3. It is error to refuse to hear an application for a continuance in replevin, even though it would not have been error to have refused it when heard. *Marshall v. Fulgham*, 4 How. 216.

4. A replevin bond, given for the payment of rent in three months under the statute, may be made payable to the sheriff conditioned for the payment of rent to the plaintiff; the statute is silent as to whom the bond shall be payable, but says, the sheriff shall *take it*, which will authorize it to be made payable to the sheriff, who may assign it to the landlord, and the landlord may

move on the bond, in the circuit court, against the obligors in the bond under the statute; and on such motion, no defects in the original proceedings in the attachment for the rent can be taken advantage of, as they are merged in the bond; and where a three months' bond is given, which admits the rent, none of the papers in the original attachment need be returned to the circuit court; but it is otherwise, where a writ of replevin is sued out, denying the rent to be due, then all the papers in the attachment must be returned into the circuit court. *Tooley v. Culbertson*, 5 How. 267. It may also be made payable to the plaintiff in the distress. *Peck v. Critchlow*, 7 How. 243; *Phillips v. Chaney*, 7 How. 250. If made payable to the sheriff, the motion must be made in the name of the sheriff or in that of his assignee, if he have assigned the bond, or in that of his successor in office, if out of office; the one in whom the legal right is, must make the motion. *Lazarus v. Triple*, 1 S. & M. 575.

5. Whether the writ of replevin will lie in this state, in any case except case of distress for rent, in the absence of a statutory provision allowing it. *Quære?* At all events, it will not lie except where there has been a *tortious* taking; therefore, a writ of replevin will not lie upon an allegation, that the property was held by the party in possession against the consent of the person applying for the writ. *Wheelock v. Cozzens*, 6 How. 279.

6. Where replevin issues on distress for rent, no declaration is necessary; the issue at court is made up on the writ. *Parkhurst v. Dunlap*, 6 How. 577.

7. In an action of replevin, un-

der the statute of 1842, a judgment in favor of the plaintiff for so much money is erroneous; it should be in the alternative, for the property, if to be had, if not, then for its value; and if for the plaintiff, and the defendant has elected to give bond and retain possession of the property, the judgment should be entered against both principal and surety in such bond. *Anderson v. Tyson*, 6 S. & M. 244.

8. After judgment by default, upon due notice, on a three months' replevy bond for rent, a clear case of error must be made out to entitle the defendant to a reversal; and the omission to recite in the bond to whom the rent is due, will not be a sufficient objection; the obligor is estopped by the bond to deny that the rent is due; and a payment to the constable before assignment by him, or to his assignee after assignment, will be good; and a motion and judgment on such bond, by the assignee, will be a bar to all future action upon it. *Robinson v. White*, 7 S. & M. 39.

9. The proceeding by motion, on a replevin bond for rent, is a summary remedy, and the statute must be strictly pursued; the bond is the foundation of the judgment, and it must appear upon the record, that it was lodged in the office of the clerk of the circuit court, or the court has no power to award the execution; and if the record shows, that the bond was lost before it was ever lodged in the proper office, the court cannot take jurisdiction of the case. *Tift v. Virden*, 7 S. & M. 91.

RETRAXIT.

1. The special plea of *retraxit*

is a good plea, under the practice of this state; and it is, therefore, error to strike such a plea out, or treat it as a nullity. *Williams v. Northern Bank of Mississippi*, 7 S. & M. 28.

2. It is, no doubt, the law, that a judgment upon a *retraxit* is as much a bar to another suit for the same cause between the same parties, as a judgment after verdict; it is the admission, by the plaintiff, on the record, that he has no cause of action which constitutes the bar, and operates as an estoppel. *Coffman v. Brown*, 7 S. & M. 125.

3. A plea that "a suit had been previously brought for the same cause of action between the same parties, in which the plaintiff, in his own proper person, came into court, and confessed that he would not further prosecute his said suit against the said defendant, but from the same altogether withdrew himself, whereupon it was considered by the court that the plaintiff should take nothing, and that the defendant go without day," does not show a *retraxit*, and is bad on demurrer. *Ib.*

RIVERS.

1. The act of congress establishing the Mississippi river as the western boundary of the Mississippi territory, and adopting the common law for the government of that territory, thereby fixed the middle of that river as the true boundary line, and the rights of riparian owners thereon must be governed by the common law; that law gives the owners of the banks of rivers not *navigable*, whatever the size of the river, exclusive proprietary rights to the middle of

the stream, subject only to the right of passage over it, as a highway, where the stream admits of it; and, in the case of the Mississippi river, the acts of congress, and treaties, declaring it a common highway, and forever free to the citizens of the United States, without any tax, duty, &c., do not alter the common law rule; they give a right of easement over the river only, and the owner of the bank may, therefore, recover of persons who use the bank of the river, without his consent, the price which the owner has published he will charge for such use, if the terms be known to those using it. It may be questioned whether the exclusive proprietary right extends below *low* water mark; and, also, whether the navigators of the river might not, in case of necessity, use the bank of the river, or fasten to the trees thereon. *Morgan v. Reading*, 3 S. & M. 366.

2. A *navigable river*, in technical language, only applies to rivers in which the tide ebbs and flows, and then only to such parts of the river as are subject to the flow of the tide. *Ib.*

ROADS.

1. Where the statute required the intervention of a jury, *to lay out, turn, change or alter* a road, it was held, that the entire *discontinuance* of a public road, by the county court, was not embraced in the statute, and could be effected without the intervention of a jury. *Nicholson v. Stockett*, Walk. 67.

2. Where a public road is vacated and discontinued, the party to whom the soil belongs is to be restored to the use of it, even

though he may have previously received compensation therefor. *Ib.*

3. Where a new road is to be laid out or altered, justice and the constitution require that the owner of the soil should have notice of it, and a jury be empanelled to give him compensation. *Ib.*

4. The county court has only a statutory jurisdiction on the subject of laying out roads, which must be strictly pursued, or its acts in relation thereto will be void; and where the statute provides that a jury shall lay out the road, it can only be done by the jury, and not by the court; and the jury must pursue the mode pointed out by the statute, or the road will not be legally established; and when the road has not been legally laid out in the mode prescribed by the statute, the order of the court, laying out the road, will be no justification, in an action of trespass against the person laying out the road, by the owner of the soil. *Stockett v. Nicholson*, Walk. 75.

5. Where the statute directed that the jury should lay out new roads to the greatest advantage of the inhabitants, and as little prejudicial as may be to private enclosures; which laying out and damages were to be done and ascertained by the jury on oath; and a jury, empanelled under that statute to lay out a public road, reported that they "had viewed the road and could be a good one,"

upon which report the county court directed the road to be laid out; held, that the order of the county court was illegal and void, and no justification to the person laying out the road under it. *Ib.*

6. The commissioner of public roads is liable to criminal prosecution for neglect of duty. *State v. Commissioners of Roads of Adams County*, Walk. 368.

7. In debt, for the penalty under the statute against cutting down trees, the defendant having cut them for building a bridge, is within the exception in favor of public roads. *Courtney v. Smylie*, Walk. 497.

8. An overseer of roads cannot maintain an action before a justice of the peace against a person for obstructing the highway, unless he first obtain a judgment of the board of police against the obstruction under the statute, (H. & H. 450, § 29, and 453, § 41,) which makes it the duty of the overseers of roads to remove all obstructions upon roads, and charge the expense thereof to the offenders, and to report the number of days of the obstruction, and the expense of removal, to the board of police, which was authorized to enter judgment thereon, which judgment, if for an amount less than fifty dollars, was recoverable by suit before a justice of the peace. *Hairston v. Francher*, 7 S. & M. 249.

S.

SALE.

1. B. went to the house of S. to collect a bill of exchange; S. agreed to pay it in cotton, which B. agreed to receive; they went to the gin, and had seventy-three bales of cotton separated and removed from other bales; the bales thus separated were weighed and their value calculated, which was within a small sum of the amount of the bill. The overseer was directed by S. to have the cotton hauled to the river, (the plantation being on the river,) for B.; but it did not appear that this transportation was any part of the contract; the gin and all the cotton in it were burned the night after the contract; *held*, the facts constituted a constructive if not actual delivery of the cotton to B., and formed a good payment of the bill of exchange to the amount of the cotton. *Stamps v. Bush*, 7 How. 255.

2. Where there has been a constructive delivery of property, and the same is destroyed before an actual change of possession, the subsequent declarations of the parties will not change the legal effect of their contract, unless sufficient to amount to a discharge of the one previously entered into. *Ib.*

3. See *Personal Property*, 3, 4, for conditional sale of.

4. A sale of a negro girl, coupled with an agreement to return her to the lender, if the purchase-money be not paid by a given time, is a conditional sale. *Mount v. Harris*, 1 S. & M. 185.

SCIRE FACIAS.

1. See *Judgment*, 24; requisites of, to revive judgment.

2. See *Executor and Administrator*, tit. *Devastavit*; and *Revival of suits against*, as to how far, by *scire facias*, he may be made personally liable for a *devastavit*.

3. See *Executor and Administrator*, *ib.* as to *scire facias* to revive suit against intestate, before expiration of nine months from grant of letters; and on what parties it must be served and how judgment rendered.

4. When a new person is to be benefited or charged by the execution of a judgment, a *scire facias* is necessary to make him a party; but where an execution is neither to be beneficial nor chargeable to one who is not a party to the judgment, a *scire facias* is unnecessary; thus, where it is sought to subject the lands of a deceased party to a judgment against him, his heirs must be made parties by *scire facias*; but if the lands have been previously sold by order of the probate court, and the interest of the heirs thus divested, the lands may be sold under the execution without a revival against the heirs; but, in such case, the purchaser of the lands at the executor's sale, the *terre tenant*, must be made a party by *scire facias*. *Smith v. Winston*, 2 How. 601.

5. See *Judgment*, 39, 96, for necessity of reviving judgment by *scire facias*.

6. Under the statute permitting

revivals of judgments in any court of record by *scire facias*, decrees in chancery are embraced. *McCoy v. Nichols*, 4 How. 31.

7. Where an execution has once issued on a judgment, it is not necessary to revive such judgment by *scire facias*, as the law presumes the execution to be continued on the roll. *Ib.*

8. See *Variance*, 5; for fatal variance between *scire facias* and recognizance.

9. A sheriff's sale of real estate under execution on a judgment against the intestate without revival against his heirs, is not void, but only voidable, and cannot be collaterally attacked. *Smith v. Winston*, 2 How. 601; *Ib.* in the case of sale of personalty without revival against the administrator. *Drake v. Collins*, 5 How. 253; so, also, if the execution issue after the lapse of a year and a day without revival. *Mitchell v. Evans*, 5 How. 548.

10. After a *scire facias* to revive a judgment has been sued out and payment plead to it, and verdict thereon, it is too late to object to errors in the original judgment. *MAfee v. Patterson*, 2 S. & M. 593.

11. All the parties to the original judgment must be parties to the *scire facias* to revive it; and if the *scire facias* is discontinued as to any of the parties, it will operate a discontinuance as to all; yet if those against whom it is not discontinued appear and plead, and a verdict is rendered thereon, the effect of the discontinuance as to the others will be cured, and the judgment on the verdict will bind the party. *Ib.*

12. See *Execution*, 54; *scire facias* cannot issue against heir on a judgment against executor.

SEAL, AND SEALED INSTRUMENTS.

1. A scroll, representing a seal, without words in the body of the instrument, showing the intention of the maker to make it a sealed one, will not make it such. *Bohannon v. Hough*, Walk. 461; but otherwise with a writ of attachment; that is a judicial writ, and a scroll at the end of the justice's name, with the word seal written in it, will be a sufficient sealing. *Wright v. Steamboat Vesta*, 5 How. 152.

2. A printed impression affixed to the name of the parties to a forthcoming bond, is a sufficient seal. *Wanzer v. Barker*, 4 How. 363.

3. Sealed instruments are negotiable by statute, and entitled to days of grace. *Skinner v. Collier*, 4 How. 396.

4. To sealed instruments all parties are principals, unless it appear on the face of the instrument that some are sureties, and they cannot, by plea, be allowed to change their character; they are estopped by their seals; if, therefore, any of the obligors be sureties who have been discharged by extension of time granted the principal, they can only make their defence in equity. *Wil- lis v. Ives*, 1 S. & M. 307.

SET-OFF.

1. See *Executor and Administrator*, 17; as to power to set-off debt due by intestate, against debt due to administrator, where estate is insolvent. A set-off is in nature of a cross-action, and can be set up only where suit might be brought. *Whitehead v. Cade*, 1 How. 95.

2. See *Bills of Exchange and*

Promissory Notes, 24 ; as to set-off, by holder, of note not indorsed.

3. See *Justice of Peace*, 7 ; as to power to allow set-off, greater than his jurisdiction.

4. Where A. sued B. for a medical account, and B. plead set-off of slave of the value of \$500 ; and on the trial, proved the sale of the slave to A., but omitted to prove its value ; *held*, that the jury ought to assess the average value of slaves, at the time, for its value ; and that it would be ground of new trial, wholly to omit giving any value to it. *Lewis v. Farrish*, 1 How. 547.

5. See *Covenant*, 1 ; how far pleadable in action of.

6. The statute of limitations will apply to set-off ; not to payments. *Barnes v. Lloyd*, 1 How. 584.

7. Where a note is neither filed as an offset, nor set out in the plea of payment, it will be rejected, when offered, in evidence. *Smith v. Winston*, 2 How. 601.

8. See *Bills of Exchange and Promissory Notes*, 43. Offset of indorsement may be plead, where payee of note sues indorsee on a different contract.

9. A set-off, legally in the hands of the defendant, before action brought, is a good set-off to an action by an administrator. *Carpren v. Canavan*, 4 How. 370.

10. See *Banks*, 12 - 16 ; as to set-off of bank-stock and bank-notes.

11. Where the defendant pleads the set-off against the payee of the note, in an action brought by the payee, for the use of third party, against the maker, he must show that he held the offset, previous to notice of the assignment ; and, in default of other evidence of assignment, the institution of the suit, for

the benefit of a third party, will be regarded as notice. *Northern Bank of Mississippi v. Kyle*, 7 How. 360 ; *Freeland v. Mann*, 1 S. & M. 531. And no agreement or set-off made, or acquired after notice of the transfer of a note, will affect the right of the assignee. *Emmons v. Myers*, 7 How. 375 ; *Lake v. Brown*, 7 How. 661.

12. The acceptor of an inland bill of exchange, being surety for the payee on a different debt, was sued on his suretyship, and judgment rendered against him, and a levy made on his slaves, sufficient to satisfy the execution ; the acceptor on being sued on the bill, by the assignee of the payee, plead the pendency of the levy which was made, previous to notice of the assignment to him, as a set-off to the bill of exchange : *Held*, that it was a valid set-off ; the levy was a *prima facie* satisfaction of the judgment, and entitled the surety to an action against the principal, for the amount thereof ; and the surety would therefore be entitled to it, as a set-off ; if the levy were legally discharged, without an actual satisfaction, the assignee should show that fact, in avoidance of the set-off. *Kershaw v. The Merchants Bank of New York*, 7 How. 386.

13. Courts of law and courts of equity follow a similar general doctrine, on the subject of set-off ; the statute is predicated on equitable principles, and should be liberally construed. *Ib.*

14. A plea of set-off to the whole action, which offers to set-off a less amount than that sued for, is bad. *Ib.*

15. Where all the parties to a bill of exchange are sued under the statute, an offset, under the plea of general issue, with notice of the

offset, may be proved, by the acceptor of the bill, to have been held by him against the payee, who is also sued, previous to notice of the assignment. *Ib.*

16. It seems, that if a bank make a general assignment of its effects, for the benefit of creditors, and the assignees sue one of its debtors, the notes of the bank will be a good offset. *Commercial and Railroad Bank of Vicksburg v. Atherton*, 1 S. & M. 641.

17. Where exceptions are taken to the exclusion of evidence to prove a set-off, the bill of exceptions must set out the items of the set-off, filed with the plea, otherwise the high court will not notice the objection. *Rankin v. Butler*, 2 S. & M. 473.

18. The words "set-off withdrawn," in a record, refer not to a plea of set-off, but to the account of set-off, filed with the plea. *Ib.*

19. See *Bills of Exchange and Promissory Notes*, 66. Where a note is payable to a bank, but never belonged to it, the notes of the bank are not offsets.

20. A special plea of set-off, to an action of assumpsit, is unknown to the common law and to our statutes, and is properly treated as a nullity, while the right of set-off exists, and may be made available, under the plea of payment. *Houston v. Smith*, 2 S. & M. 597; *Henry v. Hoover*, 6 S. & M. 417. But if such a plea of set-off be pleaded, and issue be taken on it, and a verdict and judgment be rendered, the mispleading will be cured by the verdict. *Ib.* If such a plea, though a nullity, be demurred to, the demurrer must be disposed of, or it will be error; however technically correct it may be, the demurrer to it must be sus-

tained. *Anderson v. Burke*, 6 S. & M. 475; *Bullard v. Dorsey*, 7 S. & M. 9.

21. D., being indebted to the Union Bank of Mississippi, drew a bill of exchange on H., at Mobile, and the bank sent the bill to a bank in Mobile, for collection, where it was attached by a creditor of the Union Bank, and by a judicial proceeding, in Alabama, sold to R.; but, before the sale, D. became possessed of notes of the Union Bank, and tendered them to the bank, in payment of the bill, which refused them: *Held*, in a suit, by R. against D., that the notes were proper offsets; and that the order of publication, in the attachment suit, in Alabama, to bring D. before the court there, was not notice to D. of the transfer of the bill. *Riggs v. Dyche*, 2 S. & M. 606.

22. See *Bills of Exchange and Promissory Notes*, 157. The maker is not entitled to the benefit of set-offs had against the assignee, where the note has returned into the hands of the payee.

23. See *Judgment*, 111, 112; for set-off of judgment for costs against bank, or judgment of bank against the officers to whom the costs are due; and whether an assignee of the judgment cannot object to the set-off, at law?

24. Where A. discounts a note for B., and takes it payable to C., and informs B. it is for C., B. will, when sued on the note, be entitled to any offset he may have against C., even though C. actually had no interest in the note. *Stovall v. The Northern Bank*, 5 S. & M. 17.

25. It seems, the debtor of a bank, when garnisheed, cannot make a set-off of notes of the bank,

acquired subsequent to the garnishment. *King v. Elliott*, 5 S. & M. 428.

26. Where no set-off is claimed by the pleadings, one cannot be allowed by the jury; where, therefore, G. sued H. P. for \$1790, in assumpsit, and H. P. plead the general issue, and it was proved that H. P. admitted that he owed G. that sum; it was also proved that H. P. executed his note for \$600, to G., in part payment of it, and that, at that time, G. owed H. P. about \$600 besides; the jury found a verdict for G., to the amount of \$637: *Held*, that the verdict was erroneous; it should have been for the sum due G., without allowing the set-off. *Gibson v. Powell*, 5 S. & M. 712.

27. A set-off must be mutual; that is between the same parties; or, as expressed in our statute, the parties must be "dealing together," otherwise it cannot be allowed; where, therefore, D. sued B. & M., on a note payable to E. or bearer, and the defendants proposed to prove that E. transferred the note to W., and while W. was bearer of it, he was indebted to M. in a large amount by note, and had promised that M. should be allowed to credit the note sued on, on the note held by him; *held*, that the evidence was inadmissible; the individual debt of W. could not be set-off against the joint debt of B. & M. *Bullard v. Dorsey*, 7 S. & M. 9.

28. Where the plaintiff sues upon a joint note, the defendants cannot set-off a debt due by the plaintiff to one of the defendants, in his own right. *Ib.*

29. J. W., with G. as his surety, executed a note to the executrix of M. W.; J. W. died, and F. G. W., his administrator, who was one of

the distributees of the estate of M. W., directed the executrix to retain the note out of his distributive share, which was not done; the executrix sued G., the surety of J. W., on the note, and G. plead payment: *Held*, that the debt being due by J. W., and the distributive share to his administrator, individually, there was an absence of that mutuality, which is essential to the right of set-off; that the executrix could not compel compliance with the direction of F. G. W., and it did not, therefore, amount to a payment. *Wadlington v. Gary*, 7 S. & M. 522.

30. A., having purchased property, at an administrator's sale of the effects of B., cannot, when B.'s estate is insolvent, buy up the notes of B., to offset them against his debt to the administrator; where, however, A. & B. have, respectively, mutual and subsisting demands against each other, and A. dies insolvent, B.'s debt against A., will be a valid set-off to A.'s debt against B., notwithstanding A.'s insolvency. *Cotton v. Parker*, 1 S. & M. Ch. 191.

31. See *Payment*, 17. Set-off will be ordered against debt not secured, where the plaintiff has two debts, one secured and the other not.

32. See *Consideration*, 26. A claim growing out of breach of covenant, cannot be set-off against action on a note.

SHERIFF, AND SHERIFF'S SALE.

1. Where vendor retains possession of personal property, which the vendee has acquired title to by Sheriff's sale against vendor, such

continued possession is not *ipso facto* fraudulent. *Hoggatt v. Hunt*, Walk. 216.

2. The statute giving summary remedies against sheriffs must be strictly pursued, and does not take away other remedies. *Connell v. Lewis*, Walk. 251.

3. The penalties inflicted by the statute upon a sheriff for omitting to levy an execution or for failing to pay over money collected on an execution, cannot be recovered without notice to the sheriff of the motion against him. *Vance v. Connell*, Walk. 254. *Coleman v. Saunders*, 5 How. 287; notice must also be served on the sureties, where the motion is against the sheriff and his sureties; even though the statute does not in so many words, require notice. *Demoss v. Camp*, 5 How. 516.

4. See *Slaves* 10; as to sale by sheriff of runaways and his liability for neglect.

5. See *Real Estate* 8; as to title of purchaser at sheriff's sale of land of vendee, who has only title bond.

6. If a sheriff fail to return an execution on the return day, he is liable on motion, to judgment for the amount of the execution, with 8 per cent. interest and five per cent. damages. *Laws of Miss.* 1828, p. 78; *Helm v. Gridley*, Walk. 511.

7. Sheriff should be permitted to amend his return, according to the facts. *Garner v. Collins*, Walk. 518.

8. Where a deputy sheriff has levied on a slave under attachment, he cannot legally leave the slave in the possession of an agent, for safe keeping; nor will such possession of the agent be a defence to an action of trover for the slave

by the defendant in the attachment; the deputy sheriff has no power to appoint agents under him; that power belongs to the sheriff. *Welch v. Jamison*, 1 How. 160.

9. The return of a sheriff on process, when general and legal, is evidence both for and against him, to the extent of the liability he incurs under the return; but where a sheriff makes a return of matters which admits the non performance of his duty and gives an excuse for it, the return will not be evidence of the validity of the excuse; as where a defendant was arrested upon *ca. sa.*, the sheriff's return that the defendant was "released as to bail by the plaintiff," would not be evidence for the sheriff in a proceeding to make him liable on special bail, under the statute for not taking bail. *Rowand v. Gridley*, 1 How. 210.

10. Where a title derived at sheriff's sale is relied on, the judgment and execution must be shown, to sustain the title. *Berry v. Hale*, 1 How. 315; *Starke v. Gildart*, 4 How. 267.

11. In an action on a sheriff's bond, by a former sheriff against his successor in office, for fees collected; the executions by which the money has been made are good evidence; and the sheriff who levied the execution cannot object to them for want of the fee bill of costs. *McIntyre v. Weathersby*, 1 How. 331.

12. See *Coroner*, 1; return of coroner conclusive of his authority against him, though it do not appear that the sheriff is dead.

13. Where land has been purchased at sheriff's sale, under a regular execution, and a deed given, the circuit court to which the execution was returnable, cannot, on

motion, set the sale aside for fraud or other matter *in pais*; the proceeding would be in violation of the constitution, which declares that no man shall be deprived of his life, liberty or property, except by due course of law. The judgment, on the motion, setting the sale aside, would be absolutely void, whether the purchaser had notice of the motion or not. *Flournoy v. Smith*, 3 How. 62.

14. Quashing an execution cannot defeat a sale previously made under it; nor can the sheriff be permitted to impeach his return on an execution, and to prove that at the time of the sale of land under it, the execution was fully satisfied; for a sale to a *bona fide* purchaser, even after satisfaction of an execution, and not apparent of record, will be upheld. *Van Campen v. Snyder*, 3 How. 66.

15. See *Judgment*, 40; for duty of sheriff in serving process, to entitle to judgment by default.

16. See *Attorney*, 12; for motion against sheriff by attorney in his own name.

17. In an action on a sheriff's bond, it is not necessary to aver that the chief justice of the county court had approved the sureties, and administered the oath; and if it be, the failure to do so can only be taken advantage of by demurrer; the indorsement by the chief justice, to the effect required, is merely evidence that such steps have been taken. *Carmichael v. The Governor*, 3 How. 236.

18. In a suit on the sheriff's bond, for money collected, the declaration should aver the collection, while he was sheriff, and under legal process. *Ib.*

19. A judgment rendered against the sheriff, on motion, to pay over

money, is not evidence that the money has been collected, in an action against the sureties on the sheriff's bond, the breach of which assigned, was a failure to pay such money over. *Ib.*

20. See *Execution*, 19; how far variance between execution and judgment, avoids sale.

21. See *Execution*, 20, 24, 25; an entry of satisfaction made by mistake, may be set aside; a payment in bank notes, not a satisfaction; and a sheriff has no power of any kind over execution, after return term.

22. See *Forthcoming Bond*, 15; how far sheriff's return of taken and forfeited, will preclude inquiry as to whether it was signed in blank.

23. A sheriff's return on *mesne* process, cannot be amended after judgment and the lapse of the term at which it was rendered. *Dorsey v. Peirce*, 5 How. 173. *Williams v. Oppelt*, 1 S. & M. 559; *aliter*, on final process; see *Amendment*, 8; *Planters Bank v. Walker*, 3 S. & M. 409.

24. See *Scire Facias*, 9; how far sheriff's sale without revival of the judgment by *sci. fa.*, against the administrator, in case of personalty, and heirs in case of realty, is void or voidable.

25. See *Chancery*, 146; how far low price, will be ground for setting aside a sheriff's sale, coupled with a mistake, as to the priority of a mortgage incumbrance.

26. In proceedings by motion against the sheriff and his sureties, notice must be given to the defendants in the motion. *Coleman v. Saunders*, 5 How. 287.

27. The statute authorizing summary proceedings by motion against the sheriff and his sureties on his

bond, for official misconduct, is not a violation of the right of trial by jury; the motion is based upon the contempt of the officer in not complying with his duty; but although the statute allowing the court to hear the motion without the intervention of jury, be constitutional, yet where the sheriff and his sureties demand the trial, it is usually granted them; where, however, there was nothing in contest on such a motion, but whether there had been notice duly served, the trial by jury is properly refused; the right of trial by jury in any case, may be waived either expressly, or by implication; and it will be a waiver by implication, where a party permits a trial to progress, without making the objection of the absence of a jury. *Coleman v. Miss. and Ala. Railroad Co.* 5 How. 419. *Lewis v. Garrett*, 5 How. 434. See *Demoss v. Camp*, 5 How. 516. *Lewis v. Fellows*, 6 How. 261. *Anderson v. Carlisle*, 7 How. 408.

28. Where a coroner served a notice on the sheriff and his sureties, and returned it served by himself into court, if no statement appear of record, that the coroner did not serve it, the court of errors and appeals will presume that the service by the coroner was properly proved in the court below. 5 How. 419.

29. After the sheriff and his sureties have appeared and contested a motion against them, on its merits, it is too late in the high court to object to want of notice, or the sufficiency of the motion. *Izod v. Addison*, 5 How. 432; *Lewis v. Garrett*, 5 How. 434.

30. Where a sheriff returns on an execution 'not levied' merely, he will be liable to a motion on his

bond to the plaintiff, in the execution for the neglect. 5 How. 434.

31. In proceedings against the sheriff and his sureties, by motion on his bond, no other process or pleadings are requisite than service of a notice of the motion; the motion need not set out the bond of the sheriff in full, it will be sufficient if it describe the bond and state the sureties therein, and describe the breach of the bond and failure of duty of the sheriff in the premises; formal pleadings are not required. (See this case for the form of a motion and notice, which were sustained.) *Ib.*; and it will be sufficient notice, if it be directed to the sheriff as such, and to the sureties "as sureties on the official bond of said sheriff." *Hamblin v. Foster*, 4 S. & M. 139.

32. A sheriff's sale on execution, where there is a previous levy on other personalty undisposed of, will pass title to an innocent purchaser; the execution might have been quashed on account of the previous subsisting levy, but if that is omitted, the sale will be good. *Bibb v. Jones*, 7 How. 397.

33. The plaintiff in execution, may move against the sheriff individually, without joining his sureties, to recover money collected by the sheriff on execution; and in such case it will be no defence to the sheriff that he was instructed by the attorney of record not to pay the money over to the plaintiff. *Dunn v. Newman*, 7 How. 582; but a payment to the attorney will always discharge the sheriff, unless positively prohibited from doing so; and the client's telling the sheriff he did not want the attorney to have the money, will not be a prohibition. *Butler v. Jones*, 7 How. 587.

34. A sheriff who fails to return an execution on the return day, is, with his sureties, liable, absolutely and without exception, for the amount of the execution, with five per cent. damages, and eight per cent. interest, to be recovered by motion in the court to which the execution is returnable. *Morehead v. Holliday*, 1 S. & M. 625; and a plea in such case, that the plaintiff had suffered no harm from the failure to return the execution, is no bar to the motion. *Ib.* Nor that the sheriff had levied on property which he had afterwards sold. *Ib.* If the term be twelve judicial days, and the sheriff return it on the seventh day, it is too late, and he is subject to the penalties of the statute. *Steen v. Briggs*, 3 S. & M. 326; and the motion may be made against him at a subsequent term for his failure to return. *Ib.*

35. A sheriff's return of satisfaction on an execution, cannot be set aside as false upon motion of the plaintiff without notice. *Mann v. Nichols*, 1 S. & M. 257.

36. It is error to permit a sheriff to amend his return on *mesne* process, after the return term, without notice to the adverse party. *Williams v. Oppelt*, 1 S. & M. 559.

37. See *Execution*, 24; sheriff has no power to receive money on execution after return day has passed.

38. Where a sheriff returned that he had levied on two horses, the property of the defendant, and had levied them in the possession of H., from whose custody they had been taken; it was held that the sheriff was liable, on motion, for the value of the horses, to be assessed by a jury; if his return had shown the value, a jury would not have been necessary; he would have been

liable for that value. *Collins v. Terrall*, 2 S. & M. 383.

39. A sheriff will not be permitted to contradict his return by his testimony. *Planters Bank v. Walker*, 3 S. & M. 409.

40. Where a sheriff sells lands at sheriff's sale, and the purchaser forfeits the sale, and the sheriff re-advertises, and sells, and the same person is a purchaser at a less price, the sheriff cannot sue him for the difference between the bids, without shewing that he has been rendered liable, or suffered some damage thereby. *Adams v. Griffin*, 3 S. & M. 556.

41. It is competent to prove by parol, or by introducing the advertisements, that the sheriff who sold real estate, advertised the same according to law; but it seems the recitals in the sheriff's deed are evidence of the advertisement. *Cocke v. Lane*, 3 S. & M. 763; they are *prima facie* evidence; whether the presumption of their truth may be rebutted by proof of their falsity, *Quære?* It seems, however, that even if the sheriff fail altogether to advertise, or advertise in a different mode from that pointed out in the statute, it will not vitiate the title of a *bona fide* purchaser at the sale. *Minor v. City of Natchez*, 4 S. & M. 602.

42. Where a sheriff levies on and sells land, he need not specify what *kind* of interest he sold; it is to be understood that he sold the fee simple; and if the defendant in execution had not such interest as was capable of being sold, that fact must be shown by the party who resists the validity of the sale; *prima facie* the purchaser at sheriff's sale gets the fee simple. 3 S. & M. 763.

43. An appearance by the sheriff

and his sureties to a motion against the sheriff on his official bond and a defence by them thereto, admit the character in which they are sued; if they desire to deny their liability as obligors in the bond, they must crave *oyer* and plead "*non est factum*." *Hamblin v. Foster*, 4 S. & M. 139.

44. See *Execution*, 57; for duty of sheriff to make money out of the parties to a note in the order of their liability, and the construction of the statute of May, 1837, thereon.

45. Irregularities of a sheriff in conducting a sale of real or personal estate under execution, will not vitiate the title of a *bona fide* purchaser at such sale. *Minor v. City of Natchez*, 4 S. & M. 602.

46. See *Surety*, 21. Surety may compel sheriff by petition to the circuit court to proceed against property of the principal; and he need not make affidavit of his suretyship, if it appear by the execution.

47. Where a sheriff sold real estate under an execution, and instituted suit to recover the price of it, his return on the execution was held to be a sufficient memorandum in writing to take the case out of the statute of frauds; and whether made by himself or his deputy, is evidence of the sale and the amount bid, in an action by the sheriff to recover the price bid for it. *Hand v. Grant*, 5 S. & M. 508.

48. In an action by the sheriff against the purchaser of real estate at his sale, all the evidence the sheriff needs to support the action, is the return on the execution, proof of the sale, and a tender of the deed to the purchaser. *Ib.*

49. Where a sheriff failed to make due return on an execution, and the plaintiff has by motion obtained judgment against him and

his sureties, and has recovered the amount from him, he is entitled, under the statute, to sue out a new execution on the original judgment, and collect the money for his own use; but the statute does not authorize the sureties of the sheriff, who have paid money for him, he being dead, on a judgment rendered against him and them for such failure to return, to pursue the same course. *Dillon v. Cook*, 5 S. & M. 773.

50. See *Ejectment*, 25; copy of the judgment and execution only parts of the record needed to uphold the sheriff's deed.

51. A sheriff who has sold real estate by virtue of his office, is not bound to make a deed to the purchaser, until all the purchase-money is paid; where, therefore, an execution against a bank for costs was levied on a piece of ground, and sold for more than the amount of the costs due, and the purchaser tendered the amount of the costs in gold and silver and the residue of the bid in the notes of the bank, and demanded a deed, *held*, that the sheriff had a right to demand gold and silver for the whole amount of his bid, and that the purchaser was therefore not entitled to a deed. *Davis v. Pryor*, 6 S. & M. 114.

52. Whether a mandamus is the appropriate remedy to compel a sheriff to make a deed to property which he has sold? *Ib.*

53. In an action against a sheriff by the publisher of a newspaper, to recover of him the cost of his advertisement of sheriff's sales; the advertisement of such sales, though signed by the deputy sheriff, will be evidence against the sheriff. *Terrall v. McRae*, 6 S. & M. 136.

54. The return of a sheriff, made upon process, in discharge of duty

required by law, which shows a reason or excuse for an omission to perform the duty required by the writ, is not conclusive evidence in favor of the officer. On a motion against him, predicated on such omission, his return may be impeached. *Duckworth v. Millsaps*, 7 S. & M. 308.

55. Where a fiat for an injunction is granted, it is the duty of the clerk not to issue it until the bond required by the fiat is executed; but if he do issue it, the service of it on a party is evidence to him that the preliminary bond has been duly executed; in a motion, therefore, against a sheriff, for omitting to make due execution of a writ of *fieri facias*, his return, that it was stayed by injunction, will be *prima facie* excuse, which will be made conclusive by the production of the injunction, whether an injunction bond were given or not. *Ib.*

56. A levy upon personal property sufficient to satisfy the judgment, being, while the levy subsists, a satisfaction of it, a sale of other property than that embraced in the levy, by another execution on the same judgment while the first levy remains undisposed of, passes no title. *Bingaman v. Hyatt*, 1 S. & M. Ch. 437.

57. Upon an execution issuing upon a judgment, a levy was made and an illegal forthcoming bond was given, which was afterwards quashed; another execution issued upon the original judgment, and property was sold under it; *held*, that the purchaser acquired no title, the judgment being in law satisfied by the first levy. *Ib.*

58. Whether, where a sheriff levies upon and sells more land than is necessary to satisfy the execution, where the land is capable of

division, the sale is void, *quære?* *Ib.*

59. A sheriff's return, that he took a forthcoming bond, is not conclusive evidence of the fact, but it may be impeached collaterally in a proceeding to which the sheriff is not a party. *Patterson v. Denton*, 1 S. & M. Ch. 592.

60. Where one of the defendants, in an execution on which only \$12 of the plaintiff's money was due, ordered out an execution, directed it to be levied on two lots of land of his co-defendant in the execution, valued at from \$5000 to \$10,000, and purchased the same himself for \$10, at a sale under the execution; *held*, that the sale was fraudulent, and that it should be set aside on the payment of the balance due on the execution. *Reynolds v. Nye*, Freem. Ch. 462.

61. Where a sheriff finds that property, which he exposes to sale, is about to be sacrificed, he should return that it was not sold for want of bidders, and wait for a *venditioni exponas*. *Ib.*

SLANDER.

1. Where verdict in slander was rendered for one dollar damages, and costs, after act of the legislature, which did not allow costs, where the damages did not exceed ten dollars, *held*, that the act being passed subsequent to the commencement of the suit, did not apply to this verdict, though rendered after the act. *Gayden v. Bates*, Waik. 209.

2. Words, merely abusive and insulting, are not actionable at common law, unless special damages are averred, and proved; they are actionable under our statute, and

the declaration should describe the offence as it is done in the statute. *Davis v. Farrington*, Walk. 304.

3. The words, "the plaintiff got drunk on Christmas," not actionable. *Warren v. Norman*, Walk. 387.

4. See *Statute of Limitations*, 9. Words *written*, embraced therein.

5. In an action for slander, where not guilty and justification were both plead, and the latter plea withdrawn before the trial, it will be error to permit it to be read to the jury. *Gilmore v. Borders*, 2 How. 824.

6. The plea of justification, when accompanied with the general issue, in an action of slander, cannot be given in evidence on the part of the plaintiff to prove that the words were spoken; but when the words spoken are proved, the jury may take the special plea into consideration, in aggravation of damages, as indicative of malice. *Doss v. Jones*, 5 How. 158.

7. In an action, under the statute, which gives an action for words spoken, which were "in common acceptance considered as insults, and lead to violence and breach of the peace," it is necessary that the declaration should bring the case within the statute, and these words are held sufficient to do so: "contrary to the statute, with a view to insult the plaintiff, and to lead him to commit violence and a breach of the peace;" and such words, to be actionable, need not be spoken to, or in the presence of the plaintiff. *Scott v. Peebles*, 2 S. & M. 546.

8. Whether it is a good plea to an action of slander, by P. against S., that the slanderous words were previously spoken by A., and by B., and that S., without malice, only repeated what A. and B. had

said, and gave them as his authors, *quære*? Yet such plea would be bad if it aver that A. and B. were citizens of a different state, and not immediately suable by P. *Ib.*

9. In an action of slander, where justification is plead, the plaintiff has a right to introduce witnesses to establish his good character, in aggravation of damages, though it be not impeached by the other side; whether or not a different rule would prevail, where the general issue is the only plea filed, *quære*? *Ib.*

10. A general charge of stealing, unaccompanied with any explanation, is actionable, because it imports a felony; but if, from the application of the charge, a felony could not have been meant, it will not support a verdict; where, therefore, a person was charged with having stolen a "bee tree," it was held, not actionable; as that phrase has reference to the wild, unreclaimed insect, and a standing tree, neither of which is a subject of larceny. *Cock v. Weatherby*, 5 S. & M. 333.

11. Slanderous words, spoken in the second person, will not support counts for words spoken in the third person, and *vice versa*. *Ib.*

12. Where a declaration in slander, contained five counts, a general verdict, assessing the plaintiff's damages at a certain sum, is not responsive to any one count in the declaration. *Ib.*

SLAVES.

1. Slavery is condemned by reason, and the laws of nature; and if the construction of a constitution involved the question of slavery or not, and that construc-

tion were doubtful in itself, the courts would lean "*in favorem vite et libertatis.*" *Harry v. Decker*, Walk. 36.

2. The treaty of cession by Virginia to the United States, which guarantees to the inhabitants of the Northwest territory, their titles, rights and liberties, does not render void that article of the ordinance of congress, of 1787, which prohibits slavery in that territory. *Ib.*

3. Any state may by its constitution prohibit slavery within its limits, and so may the legislature of any state, when not restrained by the constitution. Slaves within the limits of the Northwestern territory, became freemen by virtue of the ordinance of congress, of 1787, and can assert their claim to freedom, in the courts of this state. *Ib.*

4. Slaves, taken from Virginia in 1784, to Vincennes, Indiana, and remaining there until July, 1816, and then removed to this state, are, under the ordinance of congress of 1787, and the constitution of Indiana of June, 1816, freemen, and may assert their freedom in this state. *Ib.*

5. Murder may be committed in killing a slave; who, though in some respects property, in others are men, and the laws of Rome, giving power over their lives, were never in force here. *State v. Jones*, Walk. 83.

6. See *Trover*, 3, 4; as to criterion of damages in trover for; and, also, as to action on warranty of soundness, where vendee before action has sold the slave, and no recovery had against him. *Texada v. Camp*, Walk. 150.

7. A refusal by a person, without color of title, to restore slaves

upon the demand of the true owner, is such a fraud as brings the case within the provisions of the *Habeas Corpus* act; which provides that if any slave shall be seduced out of its owner's possession by force, stratagem or fraud, and unlawfully detained; the owner may sue out a *habeas corpus*. *Scudder v. Seals*, Walk. 154.

8. See *Trespass*, 2. As to what form of action, and who to maintain it, for injury done to slave, while hired out. *McFarland v. Smith*, Walk. 172.

9. An indictment for stealing "negro man," insufficient, and an acquittal under it, no bar to indictment for stealing "negro man slave." *State v. McGraw*, Walk. 208.

10. The provisions in the statute for the sale of runaway slaves, are merely directory, and a non-compliance with them does not invalidate the sale; if the sheriff neglect his duty, by which the slave sells for less money, the sheriff will be liable in damages. *Hutchins v. Lee*, Walk. 293.

11. Jurisdiction of equity over bill for recovery of slaves. See *Chancery*, 24.

12. See *Mortgage*, 4, 5; as to liability of mortgagor for hire; and the ownership of the issue of mortgaged slaves.

13. Where the law established a court to consist of the judges of probate and their associates for the trial of slaves, both of the associates must be present. *Arnett v. Bitsel*, Walk. 496.

14. See *Circuit Court*, 1; for jurisdiction to try slaves.

15. See *Evidence*. 52; where there is no proof of value of slaves, right of jury to assess it.

16. B. left this state for Ohio,

and took with him a slave woman, and her son, for the purpose of emancipating them, and with the intention to bring them back; having done which, he returned with the slave to this state, and resided here until his death; in his will, made after the deed of emancipation, he recited the deed, his intention to ratify it, and devised his property to the emancipated son of the woman, whom he also stated in his will to be his own son; *held*, that the deed of emancipation was *void*, being a contract made in Ohio, in violation and fraud of the laws of Mississippi, and calculated to injure the state and its citizens, and set an example pernicious and detestable; since no owner can emancipate his slave, except by proper deed or will, and proof of meritorious services, to the legislature, which must ratify the emancipation. *Hinds v. Brazeale*, 2 How. 837.

17. A slave cannot take property by devise, nor can it be held in trust for him. *Ib*.

18. It seems a will, manumitting slaves, to be taken to Ohio or Indiana, is void. *Vick v. McDaniel*, 3 How. 337.

19. That provision of the constitution of Mississippi, which declares that "*the introduction of slaves into this state as merchandise, or for sale, shall be prohibited from, and after the first day of May, 1833,*" is not merely mandatory to the legislature to make such prohibition; but is an absolute prohibition in itself; and all contracts for slaves, so introduced into the state, after the prohibited time, are absolutely void; but if the maker of a note, given for slaves so introduced, fail to make his defence thereto, when sued at

law, he cannot afterwards be heard to make it in a court of equity. *Green v. Robinson*, 5 How. 80; *Thomas v. Phillips*, 4 S. & M. 358; *Glidewell v. Hite*, 5 How. 110; such contract is absolutely void as against public policy, and the prohibition in the constitution. *Cowen v. Boyce*, 5 How. 769; *Brien v. Williamson*, 7 How. 14. This last case was decided after the case of *Groves v. Slaughter*, 15 Peters, 449, affirming a contrary doctrine, was decided. Chief Justice Sharkey reviews that case in what chancellor Kent, (1 Kent's Commentaries, edit. of 1844, p. 439,) terms a *masterly opinion*; but if an actual settler in this state, bring negroes from other states into it, with the *bona fide* intention to apply them to his own use, and afterwards change his intention and sell the negroes, such sale does not amount to a violation of the constitutional prohibition against the introduction of negroes for sale or merchandise; and where the actual settler has introduced negroes into the state and sold them, the act of sale is not conclusive evidence of the intention of the introducer; that is to be judged of from all the circumstances; where, therefore, H. filed his bill in chancery, averring that in the year 1836, he bought of E., a tract of land and negroes, at a stipulated price, and by an entire contract, though the land was valued at a fixed price, and the negroes in the mass at a fixed price; that he had paid part of the purchase-money, and that E. had introduced five of the negroes thus sold, into this state for sale, in violation of law; and, prayed for a rescission of the contract, &c., E. answered, denying the introduction

of the slaves for sale, but averring that they were for his own use, and he had afterwards changed his intention and sold them, and it was in proof that E. was a planter, and had never sold slaves as a business, and had made efforts to rescind his own purchase of the land and slaves he sold, not including the five he had introduced, before he made the sale, and that these five were never offered for sale, except in connection with the plantation and negroes; *held*, that though E. had spoken, before he bought the five slaves, of buying other slaves to add to the place, to enable him to sell the whole together; yet the facts did not constitute a violation of the constitutional prohibition. *Hope v. Evans*, 4 S. & M. 321; nor can an action be sustained by the vendee against the vendor of negroes, introduced into this state as merchandise, since May, 1833, for a breach of the vendor's warranty of the soundness of such negroes; the contract of sale and the warranty of soundness being void. *Collins v. McCargo*, 6 S. & M. 128. M. introduced negroes into this state as merchandise, since May, 1833, and sold them to C., who gave a bill of exchange in payment, which not being paid, a compromise was made, by which C. lifted the bill, and gave his note instead; afterwards another compromise was made, by which C. was to give up to M. the negroes then living, and execute a bond with surety, for a fixed sum; which compromise was carried out; *held*, in an action on the bond thus given by C., and his surety, that these renewals and compromises did not change the character of the contract between the parties; all the

subsequent contracts and agreements depending on the original illegal consideration were void, and no recovery would be had on the bond. *Collins v. McCargo*, 6 S. & M. 128. In 1837, D. M., a citizen of North Carolina, placed in the possession of W., about to move to the state of Mississippi, a negro man, to be sold or hired by him. W. brought the slave to this state, and sold him here, to M. on a credit, and took M.'s note, and transferred it to his father in payment of a debt due by him to his father; the note was afterwards paid, and D. M. sued W. and his father in equity, to recover the money, charging them with a fraudulent combination to cheat him out of it; *held*, that the complainant was not entitled to recover; the introduction of the slave was in violation of the law and constitution; and any contract growing out of, or connected with such violation, will not be enforced. *Wooten v. Miller*, 7 S. & M. 380.

20. See *Will*, 19 - 23, 31 - 44; how far slaves may be manumitted by will; or ordered to be sent to Liberia; or held in trust till legislature manumits.

21. It is not the policy of Mississippi to augment her slave population. *Ross v. Vertner*, 5 How. 305.

22. In prosecutions for criminal offences, slaves are to be treated as persons; their masters are therefore competent witnesses for them when accused. *Isham v. The State*, 6 How. 35.

23. See *Evidence*, 123; for mode in which identity of slaves may be established.

24. From the peculiar character of slave property, it seems a bill in

chancery will lie to recover them in specie. *Murphy v. Clark*, 1 S. & M. 221.

25. Slaves are distributed according to the law of the domicile of the decedent, and widows endowed thereof by the same law. *Garland v. Rowan*, 2 S. & M. 617.

26. If a hired negro should be so treated by the hirer as to cause the slave to abscond, or any other loss to the owner, the hirer would be liable, but if he uses such caution as a prudent man would with his own slave, he is not liable. And if a hired slave run away, and the hirer use proper efforts to recover him, and inform his owner of the facts, he will not be liable. *Young v. Thompson*, 3 S. & M. 129.

27. A writ of *habeas corpus*, to recover the possession of a slave, cannot be maintained, if the party against whom the writ issues, had, in good faith, parted with the possession of the slave, previous to its issuance or service. *Hardy v. Smith*, 3 S. & M. 316.

28. The affidavits made to obtain the writ are not evidence at the hearing. *Ib.*

29. The act confiding the trial of slaves for stealing money or goods, &c., in order to fix the liability of the master for the value of the property stolen, to justices of the peace, is not unconstitutional, and the master will be liable for the property stolen, whether it is in the slave's possession or not, and whether the larceny be grand or petit. *Dowell v. Boyd*, 3 S. & M. 592.

30. If the property stolen be money, an action of debt is the remedy for its recovery from the master; *aliter* if bank notes; and if the declaration be in debt, and

one count charge bank notes, and the other money to have been stolen, the latter count will be good, and a general demurrer to the whole declaration cannot be sustained. *Ib.*

31. See *Criminal*, 112; runaway slaves may be subjects of larceny.

32. The writ of *habeas corpus* allowed by statute for the recovery of the possession of slaves, when taken or seduced out of the possession of the master, overseer or owner, by force, stratagem or fraud, and unlawfully detained in the possession of another, applies only in cases where the circumstances which warrant the writ have occurred within the jurisdiction of our own state; where, therefore, slaves are taken by fraud out of the owner's possession in Tennessee, and brought into this state, and detained from the owner, he is not entitled to this writ. *Nations v. Alvis*, 5 S. & M. 338.

33. Negroes are, *prima facie*, property and slaves; and if it be attempted to assert their exemption from servitude, the mode pointed out by the statute (H. & H. 166) must be strictly pursued; and is the only mode in which freedom can be asserted in this state. *Thornton v. Demoss*, 5 S. & M. 609.

34. In a suit against a sheriff to recover of him the value of a negro whom the sheriff had sold, under an execution, and who, it was alleged, was free; the record of a proceeding, by *habeas corpus*, of a circuit judge, in which the negro was adjudged to be a freeman, is not admissible in testimony, even though the sheriff had notice of the proceeding, for the reason that the circuit judge had no jurisdiction of the *habeas corpus*. *Ib.*

35. It is the policy of our state to prevent free persons of color from remaining in it; nor does that policy conflict with the constitution of the United States, which declares "that the citizens of each state shall be entitled to all privileges and immunities of citizens in the several states," as no person of color can become a citizen, in the sense of the term used in the constitution. *Leech v. Cooley*, 6 S. & M. 93.

36. Where a slave has been prosecuted before a justice of the peace for larceny, under the statute, (H. & H. 164, § 40,) and the justice has adjudged the costs of the prosecution against the owner of the slave, the circuit court has jurisdiction of a *certiorari*, at the instance of the owner, to determine whether, so far as the judgment for costs extended, the decision of the justice had been according to the law and the facts. *Atchison v. Potter*, 6 S. & M. 120.

37. The statute which subjects the master, employer or overseer of a slave convicted of larceny, to the costs of prosecution, designed to render the person, who had the slave in charge at the time of the offence, liable for the costs, whether he were master, employer or overseer; and a judgment for costs, therefore, against a master who had not the slave in his employ, at the time of the offence, would be erroneous. *Ib.*

38. See *Distribution*, 7; a negro made free by act of the legislature, and allowed by act the right of the state in his father's estate, from escheat, may obtain distribution therein by petition to the probate court.

39. The rule that makes a master liable for the act of his slave, is limited to cases in the way of

trade, or public employment, or where the injury is inflicted by the slave in pursuance of his master's directions; and not for proceedings of the slave unauthorized by the master; a master, therefore, is not liable, in a civil action, to another, for the felonious killing of the latter's slave, by the former's, unless the former had criminal knowledge or agency in the transaction; which knowledge or agency may be gathered from the circumstances attending the occurrence. *Leggett v. Simmons*, 7 S. & M. 348.

40. S.'s slave being on L.'s plantation, L. gave him and one of his own slaves a dram of spirits; that night L. was roused from his sleep by a clamor among his slaves, which proceeded from the two to whom the spirits had been given; as L. approached them, armed with a gun, S.'s slave rushed upon him, on which he discharged his gun; after which, L. took no steps to drive S.'s slave away, but permitted him to remain upon his premises; L., in a short time, was again aroused by a similar clamor, and approaching the spot he beheld the two slaves in a struggle together, and then S.'s slave pursuing and threatening the life of the other; the difficulty seeming to cease, L. retired to the house, and the next morning S.'s slave was found dead where the last quarrel took place; *held*, that L. was not liable to S., in a civil suit, for the value of the slave killed. *Ib.*

41. See *Will*, 31 — 44; for jurisdiction of equity to force executors of a will, directing slaves to be sent to Liberia, to carry out the provisions of the will; and also for the power to make such will, and its proper construction; and how far the fraud of an executor, in

preventing slaves being removed to Liberia, will take the case out of the statute of 1842, requiring slaves so situated to be removed in a given time.

42. Upon a bill filed to enjoin a sale of land and negroes, under a deed of trust, on the ground that the debt secured was contracted for negroes introduced into this state as merchandise, in violation of the constitution, and to have the deed of trust declared void; *held*, that the injunction must be dissolved, because the complainant did not offer to surrender back the slaves to the owner. The sale being void, the title remained in the vendor; and a court of equity, in declaring the contract void, at the instance of the vendee, would compel him to restore the slaves to the vendor. *Martin v. Broadus*, Freem. Ch. 35.

43. Although, as a general rule, where personal property of a third person is seized, under execution, he is left to his remedy at law, yet, where his slaves are levied on, a court of chancery will interpose and grant an injunction, on account of the peculiar nature of that property. *Sevier v. Ross*, Freem. Ch. 519.

44. R. & H. introduced negroes into this state, since the first of May, 1833, as merchandise and for sale, and sold them to H. G. R., and took in payment for them the notes of A., payable to H. G. R., and by him indorsed, secured by mortgage on a tract of land, by A.; *held*, upon this state of facts, that R. & H. were entitled to foreclose the mortgage given by A., and assigned in payment of the illegal consideration, by H. G. R. to R. & H. *Rowan v. Adams*, 1 S. & M. Ch. 45.

45. A vendee, having purchased

negroes introduced into this state, in violation of the constitution, cannot, in a court of equity, escape the payment of the purchase-money without offering to surrender back the slaves, and account for their hire. *Ib.*

46. Where the bill charged upon the defendant the introduction of negroes into this state for sale, which was positively denied by the answer, and proof in corroboration of the answer taken; *held*, that proof of mere admissions of the party defendant that he had so introduced the negroes, would not alone be sufficient to overthrow the positive denials of the answer, and the corroborative proof. *Hope v. Evans*, 1 S. & M. Ch. 195.

47. E. sold H. a tract of land and negroes, some of the latter of which had been brought into this state in violation of law for sale; H. made partial payments, and filed his bill to rescind the contract of sale, which, he averred, was an entire one, on account of illegality; *held*, that H. was entitled to no relief; that the court could not decree a repayment of the money already paid, it having been voluntarily paid on an illegal contract, and could not decree a partial rescission of the contract. *Ib.*

SPANISH LAWS AND CLAIMS.

1. During the existence of the Spanish government in the Mississippi Territory, the laws of Spain controlled the transfer and descent of property; and those laws continued in force here till the organization of the territorial government, under the act of congress of April 7, 1798, which was effected in the

beginning of the year 1799. *Chew v. Calvert*, Walk. 54.

2. Under the law of Spain, executors had no power to sell the immovable property of the testator. *Ib.*

3. Grants of land here, by Spain, were donative, and not subject to the rights of community between husband and wife; the conditions contained in them were rarely fulfilled, and were for the benefit of the donee. *Ib.*

4. A Spanish order of survey signed by a deputy governor is presumed, *prima facie*, to be issued by the competent authority, and, in the absence of proof to the contrary, will be regarded in the same light as if signed by the governor in chief; and such order of survey vests such a right as could only be defeated by the alienation of the grantee, or his voluntary abandonment, or by an entire failure to perform the conditions, or some act against the government, which would justify a confiscation. *Winn v. Cole*, Walk. 119.

5. The report of the surveyor of the Spanish government, stating the land to be vacant, and the allegation of that fact in a Spanish grant does not amount to a revocation of a prior grant of the same land, or a confiscation; a revocation of a grant, the effect of capricious tyranny, ought not to be regarded. *Ib.*

6. But little importance was attached by the Spanish government to the conditions set forth in their grants; and the performance of such conditions, are either admitted, or dispensed with, by a confirmation of the grant by act of congress. *Ib.*

7. A patent, having relation to the origin of the title, is admissible

in evidence, though it emanated after the demise laid in the declaration, or after the death of the patentee; a Spanish grant, confirmed by the United States is a legal title, without the patent. *Ib.*

8. Congress cannot impair the vested rights of individuals, much less can their subordinate officers; it is the duty of the land-office department to advance and perfect the rights of claimants of land, and not to obstruct, or vacate them; and the proceedings of the board of commissioners is not conclusive against individuals. *Ib.*

9. See *Land Laws*, §c. 12-14; how far Spain had jurisdiction above the thirty-first degree of north latitude, and the effect of her grants.

STATUTES, CONSTRUCTION OF.

1. Where a statute was passed, and, at the same session of the legislature, an amendment, in the shape of a supplemental act, was made thereto, and it was provided by the amendment that the supplemental act should go into operation forthwith; the whole act would take effect from the period of the passage of the supplement; notwithstanding the proviso in the constitution that, unless it was otherwise provided, no law should take effect until sixty days after its passage. *West Feliciana Railroad Co. v. Johnson*, 5 How. 273.

2. In the construction of statutes, the intention of the legislature is the cardinal rule; and where, in a subsequent statute, there is no express repeal of a former one, the former statute will not be consid-

ered as repealed by implication, unless the repugnancy between the new provision and the former one, be a plain and unavoidable one. *Planters Bank v. The State*, 6 S. & M. 628. See *Banks, &c.* 628.

SUPERSEDEAS.

1. A *supersedeas* to a judgment against several persons, granted at the prayer of one, ought not to issue in behalf of all the defendants to the judgment, unless they all join in the bond; and a *supersedeas* thus issuing, will be quashed. *Jones v. The Mississippi and Alabama Railroad Co.* 5 How. 407.

2. See *Execution*, 56, as to whether a *supersedeas* is an abatement of a levy.

SUPREME COURT.

1. See *Jurisdiction*, 2, 3, as to jurisdiction of causes transferred from inferior court before final judgment; such transfer held to be constitutional. *Blanchard v. Buckholt*, Walk. 64.

2. See *Jurisdiction*, 8, as to appeal from interlocutory decree.

3. Supreme court may grant mandamus. *Ex parte Robson*, Walk. 412.

SURETY.

1. As to how far, in a court of law, surety can set up defence of injury by failure to sue the principal, see *Bills of Exchange and Promissory Notes*, 7; *Kerr v. Baker*, Walk. 140.

2. A plea by a surety, of extension of time given by the creditor

to his principal, is bad, if it do not state that it was given without the assent of the surety. *Green v. Brandon*, Walk. 372.

3. A surety on a tax-collector's bond is not discharged by a law giving the tax-collector time to make his returns in, on his executing a new bond with a fixed penalty, if he fail to give such bond. *Ib.*

4. On motion for judgment, under the statute, by a surety against his principal, the judgment against the surety, and the fact that the plaintiff is a mere surety, should appear on the record. *Brown v. Oldham*, Walk. 493.

5. The statute giving the surety the right of moving for a judgment, for money paid by him as surety, against the principal, confers an exclusive privilege and violates the constitution in that particular; and the statute, not making provision for the ascertainment, by a jury, of the facts of suretyship and the payment of the money, violates the constitution, which secures the right of trial by jury to every one. *Smith v. Smith*, 1 How. 102. *Sed vide Woodward v. May*, 4 How. 389; where the statute is held constitutional, especially if the defendant in the motion submit to trial by jury.

6. See *Bills of Exchange and Promissory Notes*, 23; as to right of surety, who becomes assignee of the note, to sue on it in his own name.

7. The surety has a right to every remedy, which the creditor has against the principal debtor, to enforce every security; to stand in the place of the creditor; where, therefore, an administrator of an estate has given his note with surety, in payment of a debt of his

intestate, and such surety has afterwards to pay it, he can subject the property of the intestate, in the hands of his distributees, to the payment of the debt thus paid by him. *Gowing v. Bland*, 2 How. 813.

8. See *Limitations, Statute of*, 14; for right of surety to make defence of the bar of statute against his principal, and as to whether a failure to present to the administrator of the principal, discharges the surety.

9. See *Sheriff*, 19; judgment against sheriff, how far evidence against his sureties.

10. There must be a positive and binding agreement to indulge the principal for a definite time, based upon a valuable consideration, sufficient to tie up and restrain the creditor during the time for which the indulgence is given, or it will not be a fraud upon the rights of the surety, nor discharge him from liability. *Payne v. Commercial Bank of Natchez*, 6 S. & M. 24; where, therefore, the plaintiff in execution on a forthcoming bond, directed the sheriff to hold up the execution until further orders from him, as the principal in the bond had agreed to deliver cotton in payment of it, and the execution was accordingly held up; it was held, the surety on the bond was not thereby discharged, even though the principal debtor had ample property at the time to pay the execution. *Newell v. Hamer*, 4 How. 684. Agreement to receive collateral security, and apply the proceeds to the payment of the debt, will not discharge the sureties, there being no agreement not to sue on the original debt. *Wade v. Staunton*, 5 How. 631. So, where the principal urges the holder not to sue, and pro-

missing that if he does not, he will pay the debt in a given time, and the holder does not sue, the surety will not be thereby discharged; nor will the mere voluntary promise to forbear, on a renewed assurance that the party will pay that which he is already bound to pay, where there is no other new consideration, discharge the surety. *Montgomery v. Dillingham*, 3 S. & M. 647. If the holder merely remain passive his rights are not impaired, but if he tie his hands for a single day, so that on that day he could not sue, the surety is released. *Johnson v. Planters Bank*, 4 S. & M. 165; where, therefore, the holder of a bill, at its maturity, received ten per cent. of its amount from the acceptor, and agreed to wait until the drawer of the bill could be heard from, though no definite time of payment was agreed on for the balance, the indorser was discharged. *Rupert v. Grant*, 6 S. & M. 433; the agreement for delay, which will discharge the surety, must be founded upon a sufficient consideration, and be such as can be enforced in a court of justice; indulgence, therefore, granted to the principal in a note, without the consent of the surety, upon the promise of the principal to pay the note out of the proceeds of a particular judgment; or, if that failed, then out of a particular note, will not release the surety, the creditor having no means of enforcing either promise. *Wadlington v. Gary*, 7 S. & M. 522.

11. The surety on a forthcoming bond, after forfeiture, is still but a surety. *Newell v. Hamer*, 4 How. 684.

12. Where a surety on a forthcoming bond supposes himself discharged by indulgence to the prin-

principal, his remedy is not by motion to quash an execution on the bond against him. *Id.*

13. Whether surety is discharged by failure of holder of note to sue principal, on being notified by surety to do so, when the principal in the interval becomes insolvent? *Quære?* *Bullitt v. Thatcher*, 5 How. 689.

14. See *Execution*, 34; what surety must do to force creditor to levy on property of principal.

15. Where property of the principal is levied on, the surety cannot move to quash the execution. *Kerningham v. Scanland*, 6 How. 540.

16. Mere delay to levy an execution on a forthcoming bond on the property of the principal, will not discharge the surety; nor will the failure of the plaintiff in execution, when he has levied on personal property of the principal, and a third party has given bond to try the right of property, to tender an issue as to the right to such third party, discharge the surety. *Melton v. Howard*, 7 How. 103.

17. See *Seal, &c.* 4; parties to sealed instruments are estopped by their seals to deny that they are principals; their remedy is in equity.

18. It is error to quash a forthcoming bond as to principal, and leave it in force as to surety. *Conn v. Pender*, 1 S. & M. 386.

19. See *Appeal*, 19; sureties on appeal bond for jury trial, in justice's court, are parties to the suit.

20. The admission of the principal is evidence against the surety. *Montgomery v. Dillingham*, 3 S. & M. 647.

21. Where the statute requires the sheriff to levy execution in his hands upon the property of the

principal before that of the surety, and the sheriff, upon application of the surety, refuse to do so, but levies on that of the surety, *held*, that the surety might, upon proper petition to the circuit court, obtain a *supersedeas* to the levy, and compel the sheriff to levy on the property of the principal; that it was not a matter within the discretion of the sheriff, but that the circuit court should, on such petition, examine into the facts, and compel the sheriff to proceed accordingly; and if it appear, on the face of the execution in the sheriff's hands, that the party is surety, he need not make affidavit of that fact to compel the sheriff to proceed against the property of the principal. *Moss v. The Agricultural Bank*, 4 S. & M. 726.

22. See *Evidence*, 227; surety, who is incompetent witness, may be made competent by substitution of other surety in his stead.

23. See *Executor and Administrator*, 173; surety, in order to save bar for non-presentation to commissioners of insolvency, must have the claim presented; for if he pay it after the commission is closed, it will not be opened for him.

24. L. being indebted to the Commercial Bank in various notes, upon which he was liable either as indorser or maker, and on which other persons were sureties for him, to reduce his liability to a single amount, proposed to the cashier of the bank to execute his individual note for the sum total due the bank, and confess a judgment in Louisiana on the note thus made, which judgment should bind all his property, and be in discharge of the notes on which he was liable; the cashier, on consultation with several of the directors, agreed to the

arrangement to be consummated when L. had, at his own expense, carried the arrangement into effect, and exhibited to the bank satisfactory evidence of it; L., after this agreement, and before he confessed the judgment, sold all of his property in Louisiana, which the judgment was to bind, to B., and then executed his note for the sum total payable to the bank, and confessed the judgment as agreed upon; *held*, that the agreement of the bank being purely conditional, and that condition not being complied with by L., the bank might disregard the arrangement with L. and sue upon the original notes against all the parties to them, and that the sureties were not released. *Payne v. Commercial Bank of Natchez*, 6 S. & M. 24.

25. Where E. sold a tract of land to P., representing that the title was unincumbered, though at the time it was largely incumbered, and P. gave a note to E. for the purchase-money with W. as his surety, and the assignee of E. sued P. and W. at law upon the note, and obtained judgment, and W. filed a bill in chancery to enjoin the judgment at law on the ground of the fraud committed by E. on P. in the sale of the property, and did not make P. a party to the bill, and P. did not complain of the judgment at law; *held*, that W. was not entitled to be relieved therefrom; whether a surety can ever avail himself of a defect in the contract of his principal, *Quære?* *Walker v. Gilbert*, 7 S. & M. 456.

26. The obligation of the contract of a surety arises from the consideration received by his principal, and if the principal be bound, the surety is also, unless there has been some variation in the terms

of the contract; where, therefore, a principal had, by promises to an assignee, induced him to purchase his and his surety's note, and thereby precluded himself from setting up a failure of consideration of the note as to the payee; *held*, that the surety was likewise precluded from making the defence. *Dillingham v. Jenkins*, 7 S. & M. 479.

27. Where one surety on a note pays it, and files a bill against a co-surety for contribution, the defendant may prove, by parol evidence, the engagement actually undertaken by him when he signed the note; where, therefore, B. made a note with H. and others as sureties thereon to a bank, and when it became due B. wished to renew it, but the bank would not permit the renewal to be made without the payment of a portion of the amount due and additional security given; B., to obtain the renewal, paid the sum required by the bank, and requested C. to go on the note to be given in renewal, having previously obtained the names of the parties who were bound on the first note, and C. did so; judgment was obtained on the last note, and H. paid the money and filed a bill against C. for contribution; *held*, that C. was not a co-surety with H. and others for B.; but for B. and his original sureties, and therefore not liable for contribution to H. *Hunt v. Chambliss*, 7 S. & M. 532.

28. One surety has a right to receive a separate indemnity from his principal for himself, and to apply it in extinguishment of his portion of his liability; and it cannot be reached by his co-sureties unless taken in fraud of them or for their joint benefit. *Thompson v. Adams*, Freem. Ch. 225.

29. A creditor may release one surety from the residue of the debt, on his payment of his portion, and such release will not operate the discharge of the other surety, in equity; nor can such other surety recover over against the one discharged unless for an excess paid by him beyond his due proportion. *Id.*

30. A surety, where the debt is secured by mortgage of the principal, may execute his individual note in payment of the debt, and receive a transfer of the original note and mortgage, and proceed to foreclose the same without having paid his own note, and the rule is the same as to an accommodation indorser. *Humphreys v. Vertner*, Freem. Ch. 251.

31. A principal will not be allowed to collect a debt from his surety while the surety is liable for the principal in a greater sum, unless the principal will fully indemnify the surety against his liability as such; more especially where the principal is insolvent; and yet more especially where the principal has agreed that the surety shall retain his debt until released from his suretyship. *Abbey v. Van Campen*, Freem. Ch. 273.

32. The surety of a vendee, for the purchase-money, cannot be discharged therefrom for fraud in the vendor, where it appears that the

vendee has sold the property and could not therefore place the vendor *in statu quo*. *Speight v. Adams*, Freem. Ch. 318.

33. Although where it does not appear on the face of the bond or note, that one of the parties is a surety, he cannot at law show that he is a surety and claim the rights of one, yet in equity he may do so, even after judgment; and where a plaintiff, in an execution, levied on personal property of the principal enough to pay the debt, and afterwards against the remonstrance of the surety, discharged the levy; *held*, that the surety was released; so where a levy was made on land of the principal, and no disposition being made of it, the sheriff, with the knowledge and tacit assent of the plaintiff, without returning the execution, abandoned the levy on the land and made a levy on personal property of the principal, which last levy failed to pay the debt, and it appeared that the levy on the land was sufficient to pay the debt, and that had it been sold under the levy it would have paid the debt; but in consequence of the abandonment of the levy, the lien of the judgment on the land was lost; *held*, that the surety was discharged and released from the judgment. *Davis v. Mikell*, Freem. Ch. 548.

T.

TAXES.

1. The mayor and council of the city of Vicksburg have the right, under the city charter, to levy an *ad valorem* tax on the sales of produce by flat-boat traders, within the limits of the city; such levy is not inconsistent with the laws of the state, nor in restraint of trade, nor an "*impost or duty*," within the meaning of the constitution of the United States. *Harrison v. The City of Vicksburg*, 3 S. & M. 581.

2. Where a citizen of Ohio comes into this state, and makes sales of his merchandise here, he must do so, subject to the laws of the state. *Ib.*

TAX-COLLECTOR.

1. See *Surety*, 4; when surety on tax-collector's bond discharged by extension of time, by legislature, to tax-collector to collect in.

2. The sureties, on a tax-collector's bond are not liable for taxes collected by him, previous to the execution of their bonds, while acting as tax-collector, under a previous election; the parties to the bond given, under the first election, would be the parties liable. *Montgomery v. The Governor*, 7 How. 68.

3. Where a tax-collector was elected, in November, 1837, and gave bond on the 15th of the same month, the sureties on the bond will not be liable for any acts of such collector, previous to his election. *Ib.*

4. In an action against the sureties of a tax-collector, on his official bond, for the non-payment of taxes collected, and their non-collection by the tax-collector, it is competent for the sureties to show that the tax-collector died before the term of his office expired, and the amount of uncollected taxes left by him, and what kind of money or bank-notes were received by him, as tax-collector, provided, it was such money as the law authorized him to receive. *Ib.*

5. A tax-collector's bond, executed in pursuance of a law in force at the time of its execution, constitutes a valid contract, upon which a subsequent repeal of that law can have no effect; and, therefore, a recovery, at the suit of the state, may be had upon such bond, against all the parties to it, after such repeal. *Tucker v. Stokes*, 3 S. & M. 124.

6. Where a special law was passed, authorizing a levy, by the board of police of a county, of a special tax to pay for public buildings, and the law was to continue in operation only three years, no court, after the expiration of the three years, could justify the levy of the special tax, or authorize the tax-collector to proceed to collect it, after the time allowed for the authority given to be exercised, had expired. *Ross v. Lane*, 3 S. & M. 695.

7. The tax-collector has no authority to collect any taxes, but such as are contained in the assessor's list, which is made out, and delivered to him annually; where,

therefore, taxes were assessed in 1841, but not collected, the collector, in 1844, has no right to collect them, unless they are inserted in the assessor's list, for the latter year. *Ib.*

8. Tax-collector's bond, the conditions of which are to collect and pay into the county and state treasury, all the state and county taxes, and to do and perform all the other duties, which pertain to his office, are not a security for any services rendered to the collector, by individuals, but for the state and county only; therefore, the sureties on such a bond, are not liable to the publishers of a newspaper, for the payment of the cost of advertising the sales of property, by the tax-collector, for taxes, notwithstanding the law makes it his duty to advertise his sales in a newspaper. *Brown v. Phipps*, 6 S. & M. 51.

TAX-DEED.

A court of chancery has jurisdiction to decree the cancelment of a tax-collector's deed, in a proper case. *Bacon v. Conn*, 1 S. & M. Ch. 348.

TENANT IN COMMON.

1. One tenant, in common, of a personal chattel, cannot sustain an action of trover against another, and has no remedy, by action, if that other take all the chattel into his separate possession; but, when opportunity occurs, he may take to himself possession. *Hinds v. Terry*, Walk. 80.

2. Even though a tenancy in common be created, by deed of

gift, effect will be given to words of survivorship; as where by deed of gift, certain slaves were directed to be divided equally between A., B. & C., when A. and B. attained the age of twenty-one, and C. the age of eighteen, the survivor or survivors of them, share and share alike in said property and the increase of the female slaves, and C. died before the age of eighteen, the right of the slaves will survive to A. and B., and the husband of C. will have no right to any portion of them. *Shanks v. Chambliss*, Walk. 249.

3. In an action of ejectment, by the vendee of one tenant in common, against those claiming under his cotenant, it is incompetent to prove, by parol, the declaration of the plaintiff's vendor, that he had many years previous, conveyed all his interest, in the land in controversy, to his cotenant; if such conveyance were lost, it could be set up by bill in equity. *Harmon v. James*, 7 S. & M. 111.

4. It seems, that one tenant in common cannot maintain an action of ejectment against his cotenant, or those claiming under him, without proof of ouster by such cotenant; an ouster, however, may be inferred from circumstances, and it is a matter of fact for the finding of a jury. *Ib.*

5. Whether, if a tenant in common be ousted by his cotenant, he may lawfully convey his interest in the premises, or, whether the deed will be void for champerty? *Quære?* Yet, if, in an action by those claiming under one tenant, against those claiming under his cotenant in common, the court instruct the jury that, if the deed from the tenant, under whom the plaintiff claims, was made after the

ouster by his cotenant, the deed was void for maintenance, and the jury find for the plaintiff, the verdict will not be disturbed, at the instance of the defendant. *Ib.*

TENDER.

1. The offer of money, in bags, is a legal tender, and it is the duty of the receiver to count it, and see that it is enough. *Behaly v. Hatch*, Walk. 369.

2. The general rule is, that if no place be fixed for payment, or performance, a tender to the person, is good. *Bates v. Bates*, Walk. 401.

3. Where a note was payable in cows and calves, and the maker told the payee, at the maker's house, that he had the cows and calves there, ready to deliver them, but did not show the cows and calves, so as to enable the plaintiff to identify them, that he might prove them, if driven to an action for them; *held*, that it was no tender, even though the payee refused to receive them. *Ib.*

4. Where a note was payable at a bank, it is not thereby made payable in the notes of such bank, and a tender of them, therefore, will not be a legal tender. *Bull v. Harrel*, 7 How. 9.

5. To constitute a valid tender, it must be unconditional, and of a definite and specific character. *Bacon v. Conn*, 1 S. & M. Ch. 348.

6. Where a tender was made for the purpose of redeeming property sold, at tax sale, and after the tender had been made, the person desiring to redeem also *requested* the purchaser to deliver possession of the property, and cancel the tax

deeds; *held*, that the requests formed no part of the tender, and were not limitations upon it. *Ib.*

7. If a person make a tender, coupled with a condition, and the tender be positively rejected, without assigning any reason or objection to it, how far the persons refusing the tender, can afterwards make objections to the form and mode of it. *Quære? Ib.*

See *Banks*, for tender in *Bank Notes*.

TITLE.

1. Martin Hackler, who died in December, 1803, having been entitled, under the act of congress of the 3d of March, 1803, to a section of land in this state, as a donation claim, which was recognized by a certificate to his heirs and legal representatives, by the board of commissioners, on the 11th June, 1806, and confirmed by a patent issuing to the same persons, in July, 1819, the surviving widow of Hackler is entitled to dower in the land. The heirs of Hackler claim by descent, and not by purchase, and cannot question the validity of the title by which they claim. The patent relates to the act of congress, which is the foundation of the title. It is the act of congress which constitutes the title, and a patent is not the only evidence of title. *Hackler v. Cabel*, Walk. 91.

2. The act of congress, and the proceedings of the board of commissioners, constitute, in themselves, a perfect title in the original donee, which cannot be questioned, or revoked, by the government itself, (much less by the heirs of the original donee,) and the patent

must relate to them as the foundation of the title. *Ib.*

3. See *Spanish Laws and Claims*, 4-8, as to conflicting titles under Spanish grants, and the effect of patents, and what title requisite in ejectment. *Winn v. Cole*, Walk. 119; *Stark v. Mather*, *Ib.* 181.

4. Want of title to personalty, where there is warranty and possession, no defence to action for the purchase-money. *Brown v. Smith*, 5 How. 387.

5. See *Ejectment*, 10; for how far estate subject to mortgage at the death of the testator will, when from lapse of time the law presumes the mortgage paid, become, by relation back to death of testator, an estate of which he died seized.

6. See *Deed*, 25-27; when title to property affected by want of registration of deed.

7. The rule that a party must recover on the strength of his own title, and not on the weakness of his adversary's, holds equally in equity as at law. *Pickens v. Harper*, 1 S. & M. Ch. 539.

TRESPASS ON CASE.

See *Trespas*, 2.

TRESPASS.

1. See *Roads*, 3, 4; as to how far illegal order of county court to lay out road justifies overseer of road in an action of trespass by owner of soil. *Stockett v. Nicholson*, Walk. 75.

2. The true distinction between trespass and case, is, when the act

done, itself occasions the injury to the plaintiff's person, or property, the action should be trespass, but where the act itself is not an injury, but a consequence from that act is prejudicial, the proper remedy is case; trespass, therefore, for injury to property, can only be maintained where the plaintiff was in actual, or constructive possession; where, therefore, an injury was done to the slave of A., while in the possession, under hire of B., A. could not maintain trespass, but must sue in case, for the injury to his reversion; B. could sue in trespass; if A. were to sue in trespass the statute of jeofails would not cure the error. *McFarland v. Smith*, Walk. 172.

3. See *Pleading*, 19, for what is good plea to trespass *quare clausum fregit*.

4. When court of chancery will stay waste by trespasser, see *Waste*, 1.

5. See *Commissioners in Chancery*, 1. When commitment of witness by, will be a trespass.

6. Where a party who has an insufficient fence, according to the statute, takes up a mule *damage feasant* in his field, and ties it in his stable, and the mule, in a struggle to escape, is choked to death, he will be liable, in an action of trespass, to the owner. *Dickson v. Parker*, 3 How. 219.

7. If a party take cattle by legal distress, and afterwards destroy it, or injure it, he will be liable in trespass for the injury; the law will treat him as a trespasser *ab initio*. *Ib.*

8. See *Chancery*, 105; chancellor will not restrain a mere trespass.

9. The owner of the soil may waive trespass, and sue in assump-

sit, where profits have been received by injuries done to his real property. *O'Conley v. The City of Natchez*, 1 S. & M. 31.



TRIAL OF RIGHT OF PROPERTY.

1. Where four judgments were obtained against the same person, and executions levied on his property, and a claimant interposed his claim to the property under the statute, there should be an issue presented for each judgment, and a separate trial had; as the statute makes the proceedings on the trial similar to those in *detinue*. *McAnulty v. Bingaman*, 6 How. 382.

2. Where damages were assessed by the jury, in a proceeding to try the right of property, on account of the fraudulent interposition of the claimant for delay, and there was no evidence to show that the claim was fraudulently made, a new trial should be granted. *Ib.*

3. In a trial of the right of property levied on under execution, the *onus probandi* lies on the plaintiff in the execution to show that the property was subject to it; the execution under which the levy was made, is an indispensable link in the evidence for the plaintiff in execution, and will not be considered as part of the record, unless embodied in a bill of exceptions. *Ross v. Garey*, 7 How. 47. And if the plaintiff do not show title in the defendant in the execution he will fail as entirely as though a paramount title in the claimant had been proved. *Thornhill v. Gilmer*, 4 S. & M. 153.

4. The plaintiff in execution is not bound, when property levied on is claimed by a third party, to tender an issue to try the right of property, unless the debtor will indemnify him for the risk, expense and delay to be incurred, or will furnish evidence of the fact that the property levied on was subject to the execution. *Melton v. Howard*, 7 How. 103.

5. In trials of right of property levied on under execution, if the verdict is for the plaintiff in the execution, it must assess separately the value of each specific piece of property levied on, otherwise the verdict will be erroneous; and if the jury in their verdict assess the value in gross, it will be error for the court, after the discharge of the jury, to alter it and assess the value separately. *Walker v. Commissioners of Sinking Fund*, 1 S. & M. 372.

6. Where an issue was made up to try the right of property to two slaves, Charles and Fanny, and the jury found Charles and *Lucy*, subject to the execution, it was held that no judgment could be rendered on the verdict. *McCoy v. Rives*, 1 S. & M. 592.

7 In trials of the right of property, a verdict of the jury in favor of the plaintiffs in the execution is equivalent to the special verdict required by the statute, that the property is subject to the plaintiff's execution. *Thomas v. Estes*, 2 S. & M. 439.

8. The provision of the statute regulating trials of right of property, that if the property levied on be assessed by the jury to a greater value than the amount of the execution levied on it, the actual amount due, shall be indorsed on the execution issuing on the

claimant's bond, is merely mandatory on the clerk, and does not apply to the judgment of the court. *Ib.*

9. Where the verdict in a trial of right of property, assessed the value of the property separately and was in favor of the plaintiffs in the execution; but the judgment of the court did not pursue the verdict, and was not in the alternative either for the property or its assessed value; *held*, that the high court would not disturb the verdict, but correct the erroneous judgment. *Ib.*

10. The execution of a claimant's bond to try the right of property, is a legal motion of the levy; and the plaintiff in the execution after a verdict in his favor upon a trial of the right of such property, cannot be compelled to pursue his remedy on the claimant's bond before another execution can be taken out on the original judgment; that bond is but a cumulative security. *Walker v. McDowell*, 4 S. & M. 118.

11. See *Evidence*, 237 - 240; who incompetent witness in trial of right of property; and how competency may be restored.

12. The trial of right of property under the statutes of this state, of December, 1830, ch. 87; and of 1822, ch. 27; the verdict if for the plaintiff in the execution, must be like a verdict in *detinue*, and the jury must therefore assess the separate value of each piece of property levied on, and which they find subject to the execution. *Penrice v. Cocks*, 1 How. 227; *Been v. Lindsey*, 2 S. & M. 581; *Walker v. Commissioners of Sinking Fund*, 1 S. & M. 372; *Pritchard v. Myers*, 3 S. & M. 42.

13. If a claimant give bond for

the trial of the right to property levied on, and, at the trial, the issue is decided against the claimant, he has the right to surrender the property levied on, in discharge of the bond; and if, during the pendency of such issue, the property levied on is taken out of the claimant's hands, by older executions, it operates as a discharge of the claimant's bond, and a court of equity will grant the claimant relief against the junior judgment-creditor. *Ferriday v. Selcer*, Freem. Ch. 258.

14. And in such case it will be no answer to the bill at the suit of the claimant, that one of the older executions, under which the property was sold, belonged to the claimant, and was levied by him on the property, and that he bought some of the property at less than its value; and that all the older executions were levied by the claimant's consent, on the property; nor will the fact that the older executions had been previously levied, and those levies afterwards dismissed, make any difference. *Ib.*

15. Where a trustee, to whom property had been conveyed in trust, to secure certain creditors, on a judgment at law being obtained against the grantor, and execution thereon levied on the property, and the trustee gave a claimant's bond to try the right, which a jury decided against the trustee, and the judgment thereon was affirmed by the high court of errors and appeals; *held*, that the trustee might, in chancery, discharge himself and sureties from such judgment, by showing that all the trust property had been sold out of his possession, by executions older than the one under which the trial of the right of property was had. *Ib.*

TROVER.

1. One tenant in common of personal chattel cannot maintain trover against the other, who takes possession of the personalty. *Hinds v. Terry*, Walk. 80.

2. The measure of damages in trover is the value of the personal chattel, and interest from the date of conversion. *Ib.*

3. In trover for the value of a slave, the damages would be the value of the slave at the date of conversion, with its yearly value from that date. *Texada v. Camp*, Walk. 150.

4. If A. sells an unsound slave, with warranty, to B., in an action by B. against A., on the warranty, it is no defence to the action, that before its institution B. sold the same slave to C., and that no recovery has been had against B. *Ib.*

5. In trover the plaintiff must prove the right of property, and right of possession in himself, and conversion, actual or constructive, by the defendant; where, therefore, P. sold slaves to S. by bill, with warranty of title, which were subject to a judgment against P.; and S. afterward sold the slaves to L., and the slaves in the hands of L. were levied on by an execution on the judgment against P., and sold; L. cannot sue P. in trover for the slaves. *Phillips v. Lane*, 4 How. 122.

TRUSTEES OF SCHOOL LANDS.

1. See *Corporations*; 3, 4; for character of trustees of school lands, and what they must prove under general issue.

2. The trustees of school lands, being *quasi* corporations, may sue themselves as individuals, indebted to the trustees, even though the names of the trustees appear in the declaration as plaintiffs, and a portion of them in the same declaration as defendants; the rule, that the same person cannot be both plaintiff and defendant in the same suit, is confined to natural persons, and does not apply to corporate bodies. *Connell v. Woodward*, 5 How. 665.

3. The various acts of the legislature, with reference to the 16th sections of land, reserved by act of congress from sale, have been so long acquiesced in by congress, and acted on and recognized, without objection, that the right of the legislature to pass such laws, they being based on the hypothesis that the acts of congress make a *grant* of such sections to the state, will not be questioned. *Ib.*

4. See *Pleading*, 100. On a note payable to E. "president of board of trustees in township, &c., and his successors in office, &c.," an action may be maintained in the name of "W., successor of E. in the office of president of *schools and school lands*, in, &c." with an averment that such person was intended by the description of the payee in the note.

TRUSTEES OF THE POOR.

Trustees of the poor are a public corporation, subject to legislative control, and the legislature may, therefore, by law, stay an execution obtained by them: *Governor v. Gridley*, Walk. 328.

5. The legality of the election of trustees of school lands cannot be investigated on a bill in chancery charging that a sale of school lands made by them was illegal, on

account of their illegal election; their acts are valid, though only trustees, *de facto*; and their legality can only be questioned by an information in the nature of a *quo warranto*. *Moore v. Caldwell*, Freem. Ch. 222.

TRUST, TRUSTEE, AND DEED OF TRUST.

1. See *Land Laws*, 3, 4, 5, as to when junior grantee of land, who gets patent, holds as trustee for senior grantee. *Stark v. Mather*, Walk. 181.

2. Fraudulent grantee declared trustee for grantor, in particular case, and trust established by parol. See *Chancery*, 15, 16. *Disimukes v. Terry*, Walk. 197.

3. See *Chancery*, 4, as to whether trustee bound to account, where he answers, in response to the bill, that the trust-property is exhausted.

4. See *Chancery*, 306, as to resulting trust in grantee where the legal title has been conveyed to him to secure to him a sum of money.

5. See *Executor and Administrator*, 26, 27; how far trustees may plead the statute of limitations against their *cestui que trusts*; and in what character administrators stand in relation to distributees.

6. A deed of trust to secure the payment of money, in which the trustee is empowered to sell, on failure to pay the debt secured, is but a mortgage, with a power of foreclosure out of court; is a valid instrument, and may be enforced by a sale by the trustee; and such sale will conclude the grantor. *Sims v. Hundly*, 2 How. 896.

7. The legislature of Georgia, in 1784, passed an act, appointing D.

and others, commissioners to make surveys in the Tennessee bend, and do other duties connected with it, and in the next year the legislature passed an act allowing ten thousand acres of land to each commissioner, to be located on the Tennessee river; before they were located, Georgia ceded the land to the general government, and the commissioners were not able to make their locations; D. transferred his interest to his son H.; and, in 1824, congress recognized the claim of D., who had previously died, and authorized D.'s heirs, in settlement thereof, to enter five thousand acres of land, either in Alabama, or Mississippi; H. made the entries of the land, but the patents were issued in the name of the heirs of D.; held, that D.'s interest in the land, when he sold to H., was the subject of a grant, and that the heirs of D. stood seised of the legal estate, as trustees, for the use of H. and his heirs. *Downs v. Downs*, 2 How. 915.

8. Where a trustee has a discretion to hire out, or otherwise dispose of the trust slaves, as he may think best calculated to benefit the *cestui que trust*, he cannot mingle the trust slaves with his own, and work his plantation in partnership, and give the beneficiary his portion of the profits merely; the beneficiary will be entitled to recover a fair hire for the slaves. *Johnson v. Richey*, 4 How. 233.

9. See *Evidence*, 212; where trustee competent witness.

10. Where a note has been secured by a deed of trust, and a new note given in lieu of the first, and a change made in the place of payment being the only difference between the notes, the security of the deed of trust will not be affect-

ed by such change. *Whittaker v. Dick*, 5 How. 296.

11. Where personal property is conveyed to a trustee to secure certain sums of money to different persons, but is to remain in possession of the grantor until he makes default in the payments, and one of the *cestui que trusts* obtains possession of the property, the trustee who is authorized by the deed to take possession, in order to make a sale, may, after default by the grantor, sue the *cestui que trust in detinue*, and recover possession of the property. *Newman v. Montgomery*, 5 How. 742.

12. The legislature may appoint trustees, and convey property in trust to them, and such trustees may sue at law on any contract within the scope of their powers. *Commissioners of the Sinking Fund v. Walker*, 6 How. 143.

13. Where A. buys land, takes possession, and pays the purchase-money, but has the legal title made to B.; the latter is trustee of a satisfied trust, and his heirs cannot oust A. in ejectment. *Brown v. West*, 7 How. 181.

14. Where a deed of trust was executed on real and personal estate, to secure an indebtedness to the grantee, and the plaintiff in a junior execution, on a debt contracted subsequent to the deed of trust, levies on the personal property, before the trust is closed, the deed of trust will be a valid bar to such plaintiff's right, unless it is expressly found that it was made with a view and intent to commit a fraud on those who might subsequently give credit to the grantor. *Wright v. Henderson*. 7 How. 539.

15. If property, conveyed by a deed of trust, is more than suffi-

cient to pay the trust debts; or if the creditor be tardy in enforcing his deed of trust, the appropriate remedy of those not embraced in the deed of trust is by bill in chancery to compel a fair settlement, to have the debts secured by the deed paid off, and a decree for the residue, if any, in favor of other creditors. *Ib.*

16. The interest of the grantor in a deed of trust of personalty is not saleable under execution at law. *Thornhill v. Gilmer*, 4 S. & M. 153.

17. See *Fraud*, 28, 29, 30; when deed of trust is void by reason of fraud of grantor, though *cestui que trust* and trustee no party to the fraud.

18. See *Fraud*, 31, 32; where grantor in a deed of trust retains possession of personalty, how far fraudulent.

19. See *Bills of Exchange and Promissory Notes*, 176; where all the notes secured by a deed of trust have matured, and a sale of the trust property takes place, the proceeds must be ratably distributed among the different notes.

20. Where a person purchases a legal title, with a knowledge of the outstanding equitable title, he is but a trustee for the latter. *Thompson v. Wheatly*, 5 S. & M. 499.

21. Where a trustee, to whom a slave has been conveyed as security for a debt, institutes an action of detinue against a person not a party to the deed, for the recovery of such slave, the recital in the deed of trust, and the production of the note, to secure which the negro was conveyed, will be *prima facie* evidence of the *bona fides* of the debt thus secured. *Hundley v. Buckner*, 6 S. & M. 70.

22. Whether the sale of a slave, under a deed of trust, by which the slave was conveyed to a trustee to secure a debt due to the *cestui que trust*, will be valid, if made by the trustee, while the slave is in the adverse possession of another, and not present at the sale, *quære? Ib.*

23. See *Statute of Limitations*, 33—34; how far it runs against a trust, and when.

24. Whenever a trustee sells the trust estate, and becomes himself the purchaser, the sale may be set aside, at the option of the *cestui que trust*, as a matter of course, without regard to the fairness or unfairness of the sale; in setting the sale aside, however, the court will order the property to be resold; and if it should not bring a higher price in the second sale, then the original sale will be confirmed; or the court, in its discretion, may set aside the sale entirely, if necessary, and order the purchase-money to be refunded; the same rule applies to a purchase by a guardian of his ward's property. *Scott v. Freeland*, 7 S. & M. 409.

25. Where a trustee has become the purchaser of his *cestui que trust's* property, if the *cestui que trust* do not take steps, in a reasonable time after he comes to a knowledge of the sale, or, if he is a minor, after his disability is removed, to set the sale aside, his assent to the purchase will be implied; where, therefore, N. S. died, leaving five children, and W. became guardian for two of them, B. for two, and F. for one; and the guardians obtained an order of sale of their wards' realty, and it was sold, and F. became the purchaser, and at the time of sale the oldest of the wards was twenty and the

youngest about twelve; and, ten years after the sale, the wards exhibited their bill against F. to have the sale set aside, because F. was the purchaser; *held*, that the laches of the two oldest children and their delay and neglect in not applying earlier to have the sale set aside, implied an affirmation of the sale by them, and precluded them from the relief sought. *Ib.*

26. The assent of the *cestui que trust* to the purchase by the trustee, in order to ratify the sale, need not be express; it is often implied by circumstances, one of the strongest of which is a failure to take immediate steps, on his attaining majority and a knowledge of the sale, to set it aside; so, also, his receiving the purchase-money, when of age and with a knowledge of the sale, is an affirmation of the purchase, and vests the property in the trustee; though in the case of guardian and ward, the reception by the latter of his distributive share, on his arrival at age, ought not to be construed too strongly against him, and ought not to operate to his prejudice, when it is obvious that he acted without due precaution. *Ib.*

27. A deed of trust, made by P., to secure all judgments outstanding and unsatisfied against P., or the firm of B. & P., cannot be held to embrace a judgment against L. & P.; where, therefore, P. executed a deed of trust, to secure, first, all judgments unsatisfied against himself or B. & P.; second, a note to C., executed by L. & P., and indorsed by S. P. L.; and after that to pay certain other debts; and H., having a judgment against L. & P., sought by bill in equity to recover of C. a sum of money paid him on account of the note due to him, on the

ground, that, by the terms of the deed, they were preferred to C.; and it was in proof, by the attorney who drafted the deed of trust, that the judgment of H. was not intended to be secured by it, and if in words it was so secured, it was a mistake; *held*, that H. was not entitled to any benefit under the deed of trust. *Lauderdale v. Hallock*, 7 S. & M. 622.

28. A person for whose benefit a trust is created without his knowledge, may afterward affirm it, and enforce its execution. *Martin v. Glasscock*, 1 S. & M. Ch. 17.

29. To enforce a specific trust upon real estate from loose and equivocal expressions, made by one of the parties in mere social conversations held at different times, would be inequitable, and contrary to the spirit and policy of the statute of frauds. *Mercer v. Stark*, 1 S. & M. Ch. 479.

30. The existence of an express trust necessarily excludes the idea of an implied trust in relation to the same thing. *Ib.*

31. Where notes are given, and a deed of trust executed to secure their payment, it is no ground for enjoining a sale under the deed of trust, that a suit at law is pending on the notes, in which their validity is questioned. *Gibson v. Niblett*, 1 S. & M. Ch. 278.

32. See *Judgment*, 139; interest of grantor in a deed of trust, or of *cestui que trust*, not subject to seizure and sale, under execution at law.

33. See *Chancery*, 19; extinguished deed of trust kept alive for the benefit of party who has paid it.

34. If property be purchased by A., with the money of B., A. will hold as trustee for B., and will be decreed to make title to B. *Powell v. Powell*, Freem. Ch. 134.

35. A trust may be created which may be perfectly consistent with the law, and yet the law may have pointed out no mode of enforcement, still it would not interpose to prevent its enforcement, but would leave its execution to the voluntary action of the trustee. *Ross v. Duncan*, Frem. Ch. 587.

TURNPIKE.

1. Where the assignees of a turnpike road company sue for tolls for passing over the road, it is not necessary to make *proferri* in the declaration of the grant of franchise, the transfer and the authority to exact toll; they are all matters of evidence. *Dulany v. Starke*, 7 S. & M. 375.

2. D. sued S. & B. to recover tolls for the passage of their stages over the turnpike road of D.; the declaration alleged that S. & B. were indebted to D. for certain tolls for passage over the turnpike road of D., which had been duly granted by an act of the legislature to G., and by G. transferred to D.; *held*, that the declaration contained a good cause of action, and was not liable to demurrer. *Ib.*

U.

USEE.

1. See *Executor and Administrator*, 164. Suit on administrator's bond must show who is the usee, and his interest.

2. The nominal plaintiff cannot discharge the suit, by an agreement with the defendant. *Emmons v. Myers*, 7 How. 375.

3. An action of detinue cannot be brought for the use of another, and, if it is done, the allegation of the use will be surplusage. *Hundley v. Buckner*, 6 S. & M. 70.

4. Where an objection is made to the insertion of the name of an usee, in the record; such objection should be made in the court below, where it might easily be remedied. *Ib.*

5. Where an instrument, not assignable, is sued on, in the name of one, for the use of another, the nominal plaintiff cannot discharge or release the action; courts of law will protect the equitable rights of the usee, by compelling the nominal plaintiff to permit his name to be used for the recovery of the claim; all he can require is indemnity against costs. *Anderson v. Miller*, 7 S. & M. 586.

USURY.

1. See *Chancery*, 46, 47; how far defendant to bill of discovery bound to disclose usury.

2. To constitute usury, there must be an agreement between the lender and the borrower of money, by which the borrower knowingly gives or promises, and the lender

knowingly takes or receives a higher rate of interest than the law allows, and with an intention to violate the statute. *Planters Bank v. Snodgrass*, 4 How. 573.

3. It seems, that if a special verdict find that there is an agreement, by which the lender knowingly takes illegal interest, the court may infer an intention to violate the statute; but, if the verdict, at the same time, show there was no such intention, the inference will not be allowed. *Ib.*

4. A special verdict found that a bank had used Rowlett's tables, in the calculation of interest, which reckoned three hundred and sixty days to the year; that this mode of calculation had never been sanctioned by the directors or stockholders directly; but was adopted by the officers of the bank, because it had been uniformly used by banks, and that there was no intention to violate the law, the object, being convenience in business, and that there was no design to gain by the tables: *Held*, that the special verdict did not make out a case of usury. *Ib.*

5. Where a note was renewed by a bank, and an additional sum was, voluntarily, on the part of the maker, included in the note renewed, for expenses incurred by the bank on account of the old note, and not as the condition of the renewal; *held*, not to be usurious. *Ib.*

6. Where a company, by its charter, were authorized to reserve interest, at the rate of seven per cent. per annum, for notes, payable

within four months, and interest, at the rate of eight per cent., on notes, which had more than that length of time to run, and they charged eight per cent. on a note discounted by them, at four months date, excluding the days of grace; *held*, that the discount was usurious; it should have been at the rate of seven per cent. *Forniquet v. West Feliciana Railroad Company*, 6 How. 116.

7. A court of chancery will not relieve against usury, after judgment at law, when the defence might have been made there. *McRaven v. Forbes*, 6 How. 569; *Yeizer v. Burke*, 3 S. & M. 439.

8. Whether a court of equity will relieve against an usurious contract, without an offer to pay the principal and legal interest? *Quære?* *Ib.*

9. Where a bank discounted a note, and received cotton from the maker, as collateral security, to ship, for the maker, to Liverpool, the maker to be credited with the net proceeds, (including the foreign exchange,) at the city of New York; *held*, that the reservation, by the bank, of the domestic exchange, between New York and Mississippi, which was fluctuating, was not, of itself, usurious. *Commercial Bank of Manchester v. Nolan*, 7 How. 508.

10. Where there is no prohibition, in a bank charter, against taking more than the legal interest, the bank will be subject to the operation of the general usury laws, the same as though it were a natural person; and, if it reserve an excess of interest, usuriously, the contract will not be wholly void, but the interest, merely, will be forfeited. *Ib.*

11. Where a bank exceeds the

rate of interest allowed by its charter, but does not transcend the general usury law, the contract is not usurious, or otherwise void for illegality. *Ib.*

12. A contract, by which a bank reserves more interest, on the discount of a note, than its charter authorizes, is not void, (where there is no prohibition in the charter,) for want of power, in the bank, to make the contract; it has power to discount the note, if it exceed its power, in taking usurious interest, the whole contract is not void, but only that portion of it, which exceeds the power of the bank. *Ib.*

13. Where a bank transcends its power, in making a contract, the whole contract is not void, but only the excess beyond the power. *Ib.* Also, *Planters Bank v. Sharp*, 4 S. & M. 75.

14. It seems, that in a suit by a bank, on a note discounted by it at an usurious rate of interest, the defendant cannot object, that thereby the bank violated its charter, and the contract was, therefore, void; the question of the violation of bank charter, cannot be thus collaterally raised. *Ib.*

15. A note, executed in Vicksburg, Mississippi, payable in New Orleans, Louisiana, with ten per cent. interest, in the absence of all proof of the legal interest of Louisiana, will not be considered usurious. *Martin v. Martin*, 1 S. & M. 176.

16. Where a party was sued for an usurious debt, and compromised the suit, by giving bond with sureties, payable at a distant day, and afterwards is sued on the bond, permits judgment to be rendered against him, gives a forthcoming bond, and allows it to be forfeited, and then seeks relief in equity, on

the ground of usury; *held*, his laches, in making his defence, would, of itself, preclude him. *Yeizer v. Burke*, 3 S. & M. 439.

17. The Union Bank sued on a note, and the suit was dismissed, on the defendant's paying two and a half per cent. commissions on the amount renewed, as a fee to the at-

torney of the bank, and the costs of the suit, and the defendants were permitted to renew the note: *Held*, that the two and a half per cent. commissions and costs, were not executed, as a condition of the renewal, and did not, therefore, affect the note with the taint of usury. *Simmons v. The Union Bank*, 3 S. & M. 781.

V.

VALUATION LAW.

1. Where a law passed, repealing the valuation law, but provided the repeal should not apply to judgments, previously rendered, the law will still be in force, as to them. *Jennings v. Hammond*, 1 S. & M. 174.

2. See *Judgment*, 94. Valuation of property, and postponement of sale, under the law, does not postpone lien of judgment.

3. The valuation law, which authorizes the defendant, in execution, to claim the valuation of his property, and if it do not sell for two-thirds the appraised value, postponing the sale for twelve months, is unconstitutional, as to contracts entered into before its passage. By Judge Clayton, in *Pickens v. Marlow*, 2 S. & M. 428.

urged in the circuit court, cannot be taken advantage of by writ of error. *Turnbull v. Witherspoon*, Walk. 351.

2. See *Bond*, 5, 6; how far omission to state the use to which the money the obligor bound himself to pay, was to be devoted, though stated in the bond, is a material variance.

3. A variance in spelling *Wanzer*, *Wanser*, is immaterial. *Wanzer v. Barker*, 4 How. 363.

4. See *Execution*, 19; how far variance between judgment and execution vitiates sale of real estate under it.

5. Where a presentment was made against J., for a criminal offence, at the December term, 1837, of the circuit court, when he was arrested, and gave bail, at that court, himself, in the penalty of \$500, and two sureties, in that of \$250 each, and at the June term, 1838, the recognizance was forfeited, and a *scire facias* against the bail issued, reciting that J. had been presented, at the June term, 1838, for the offence, and had

VARIANCE.

1. A variance as to the place of execution of the bond sued on, and the one given in evidence not being

given sureties, in the sum of \$500, for his appearance *on the 2d Monday of December, 1837*; and at the *June term, 1838*, failed to appear, and calling on the sureties to show cause why the state should not recover of each of them, \$500: *Held*, that the variance between the recognizance and the *scire facias*, was fatal. *Daingerfield v. The State*, 4 How. 658.

6. Where the judgment was in favor of the president, directors and company of the Planters Bank, and the execution in the name of the president, directors, and company of the Planters, omitting the word *bank*; *held*, that it was a clerical error, and the variance was immaterial. *Barker v. Planters Bank*, 5 How. 566.

7. Where the judgment set out in the declaration, was one rendered in December, 1830, and the one offered, in evidence, was rendered in December, 1831, *nunc pro tunc*, the cause having really been decided, in December, 1830, but the judgment not rendered, until December, 1831, the variance was *held* fatal. *Howard v. Cousins*, 7 How. 114.

8. The variance was held to be immaterial, where the bond recited that the property was *restrained* to the possession of the obligor, when the statute required it to be *restored* to it. *Peck v. Critchlow*, 7 How. 243.

9. If there be a variance between the instrument sued on, and that to be offered in evidence, the defendant may *crave oyer*, if it be an instrument of which *oyer* ought to be *craved*, and demur; or he may object to it, when offered in evidence. *Robertson v. Banks*, 1 S. & M. 666.

10. A declaration in favor of

Mary H. Banks, on a note, payable to M. H. Banks, did not aver that M. H. Banks was Mary H. Banks: *Held*, the variance could not be reached by demurrer. *Ib.*

11. See *Evidence*, 165; what variance between written instrument and that declared on, material.

12. Where the bill avers the execution of a deed of the 10th of March, 1836, and the answer denies the execution of such a deed, and the proof shows the execution of a deed of the 13th of March, 1836; *held*, that the variance excluded the deed from testimony; but if the variance were accidental, the court would allow an amendment. *Bacon v. Conn*, 1 S. & M. Ch. 348.

VENDOR AND VENDEE.

1. See *Real Estate*, 4, as to rescission of contract for want of title. *Gale v. Green*, Walk. 159.

2. Where the vendor continues in possession of slaves, which the vendee has purchased at sheriff's sale on execution, against the vendor, such continued possession is, by the sheriff's sale, redeemed of its *ipso facto* fraudulent character. *Hoggat v. Hynt*, Walk. 216.

3. Where the price of a gin-stand was agreed upon, and paid, but the vendee could not conveniently remove it, though it was ready for that purpose, and the gin-stand was left with the vendor by mutual consent, and was consumed by fire without his negligence, it was the loss of the vendee. *Smith v. Nevitt*, Walk. 370.

4. See *Real Estate*, 11, 12, 39; as to right of vendor to recover

purchase-money when bond for title given, and title not made.

5. Where vendor has no title at time of sale, but afterwards acquires it, it will enure to benefit of vendee; and neither the vendor nor those claiming under him could enforce the subsequently acquired title. *Bledsoe v. Little*, 4 How. 13.

6. Where there is a judgment against the vendor at the time of sale, the vendee will be a purchaser with notice. *Phillips v. Lane*, 4 How. 122.

7. See *Fraud*, 10; how far false representations by vendor known to be false by vendee are fraudulent.

8. Where the vendee is to pay the purchase-money before the vendor is to make a deed, the vendor need not plead tender of the titles on his part; it is sufficient if he aver a readiness to perform, but if he tender a deed with warranty, and the other party do not object to it, it will be sufficient. *Bright v. Rowland*, 3 How. 398; if however, title is to be made on the payment of the purchase-money, the purchaser must offer to pay before he can demand a deed or a rescission. *Ayers v. Mitchell*, 3 S. & M. 683.

9. See *Fraud*, 13; where vendor retains possession after sale.

10. Vendor's equitable lien does not pass to the assignee of the purchase-money. *Briggs v. Hill*, 6 How. 362; *Burke v. Gray*, 6 How. 527; *sed aliter*, if the vendor have merely given a bond for title; in such case the lien will pass with the notes, and the assignee may file a bill in his own and the vendor's name for a specific performance, and to enforce the lien. *Tanner v. Hicks*, 4 S. & M. 294.

11. A complainant who has purchased property, received a conveyance, and enjoyed undisturbed possession, must, in his bill, show clearly the defect of title or fraud, which he alleges exists, or was practised on him, before he can obtain relief. *Moss v. Davidson*, 1 S. & M. 112; *Ayers v. Mitchell*, 3 S. & M. 683.

12. If a purchaser at any time before the payment of the purchase-money, receive notice of an outstanding title, which the party who holds it designs to enforce, he may be relieved from his contract; but if the party in whom the outstanding title is alleged to be, not only disclaims any interest, but actually relinquishes all right to the property, a court of equity will not rescind the contract. *Ib.* And the outstanding title must be clearly shown, that the court may judge of its validity. *Ayers v. Mitchell*, 3 S. & M. 683.

13. The vendor of land, who takes no security for the purchase-money, has a lien upon the land sold, which continues, unless waived by some act of the party, as long as the land remains in the hands of the vendee, or of the sub-vendee, with notice of it; and extends to the purchase-money for the land sold, as well as to the land itself, and to the same extent; the purchase-money, therefore cannot be reached when it has been either paid over, or when the sub-vendee has become bound to pay to third persons before notice. *Stewart v. Ives*, 1 S. & M. 197. Such lien does not extend to sub-vendee without notice of it. *Carnes v. Hubbard*, 2 S. & M. 108.

14. Where a purchaser has examined an estate that has patent defects, that could be discovered by

ordinary vigilance, he can have no relief on account of such defects; not even if the vendor misrepresents the nature of the defects, if he use no fraud to conceal them; as where the vendor represented that the land about to be sold, contained only fifty or sixty untillable acres; and the vendee before the sale, examined all the land more than once; when the tract in reality, which was a large one, contained about three hundred acres unfit for cultivation; and where the facts are equally open to both vendor and vendee, with equal opportunities of examination, and the vendee undertakes to examine for himself, without relying on the statements of the vendor, it will be no evidence of fraud that the vendor knows facts not known to the vendee, and conceals them from him. *Halls v. Thompson*, 1 S. & M. 443.

15. A vendor about to sell a tract of land, pointed out to the vendee the probable western boundary, which had no marks to designate it, but was an open line, and its definite position not certainly known; after the purchase, upon a survey of the line, it was found further east than was represented, cutting off twenty-five acres that the vendee thought he was buying, without however diminishing the number of acres he contracted for or their quality; *held*, it was not such misrepresentation as would entitle the vendee to cancel the contract; it would be otherwise if the difference were great. *Ib.*

16. Misrepresentation to justify a rescission of a contract on that ground, must relate to some material thing; not be about a mere matter of judgment; must be clearly

established by proof, not left to doubt; on a subject unknown to the vendee; either from want of examination or entire confidence reposed in the vendor; the concealment of material facts will be, equally with misrepresentation, fraudulent; but in either case the vendee must pursue his remedy in good time after he learns the injury inflicted. *Ib.* By subsequent acts he may waive his right. *Ayers v. Mitchell*, 3 S. & M. 683. And where the vendor merely repeats what has been represented to him by his vendor, but declines to be responsible for its correctness, the contract will not be set aside if it turn out not true. *Mississippi Union Bank v. Wilkinson*, 3 S. & M. 78. *Ayers v. Mitchell*, 3 S. & M. 683.

17. The taking a bond for title, implies either that the title is imperfect, and time is required to perfect it, or else that the vendor retains the title for his own security; and where a title bond is given, and it is clear no title can ever be made by the vendor, the contract will be rescinded. *Ib.* *Ayers v. Mitchell*, 3 S. & M. 683.

18. See *Contract*, 47; a vendee by non-compliance with his own contract, cannot entitle himself to a rescission of it.

19. A vendor having sold a tract of land, and given a bond for title, upon the payment of the purchase-money can, on the vendee's failure to pay, file his bill for a specific performance of his contract; and enforce his lien on the land for the unpaid purchase-money. *Dollahite v. Orne*, 2 S. & M. 590. So also may his assignee. *Tanner v. Hicks*, 4 S. & M. 294.

20. An outstanding incumbrance

of inconsiderable amount, where the vendee has merely taken a bond for title, and owes the vendor greatly more than such outstanding lien, will not entitle the vendee to a rescission. *Halls v. Thompson*, 1 S. & M. 443; not even if the property sold has been sold under such outstanding lien to a third party, with the knowledge of the vendee; he should have protected the property, and not used such outstanding lien as a pretext for a rescission. *Ayres v. Mitchell*, 3 S. & M. 683.

21. H. bought of W. H. a tract of land, and gave in payment his notes; due in four annual instalments; and took a bond to have title made to him on payment of the notes; W. H. assigned the first note to B., who sued H. thereon. H., before the other notes were due, exhibited his bill, stating that W. H. had no title to the land, was insolvent, and outstanding judgments against him, and prayed for injunction and rescission of the contract; the vendor denied his insolvency, and said, if the vendee would comply with his contract, he could make the title; *held*, neither fraud nor an eviction appearing, W. H. was not bound to make title till the last note was paid, and that H. was not entitled to relief. *Hanna v. Harper*, 3 S. & M. 793. Such bill cannot be maintained without an offer to pay or having paid the whole purchase-money, and cannot be filed till the notes are due, where the bond for title was given to be made when the last note was due. *Bird v. McLaurin*, 4 S. & M. 50.

22. Where a vendor by deed of general warranty conveyed a tract of land which was subject to judgments older than the conveyance, and took the notes of the vendee for

the purchase-money, and afterwards assigned them to different persons, the vendee will be entitled to relief in equity against the payment of the notes in the hands of the assignees to the extent of the judgment liens; and the loss must fall ratably on the holders of the notes. *Kilpatrick v. Dye*, 4 S. & M. 289.

23. If a vendee, who purchases land on a credit, and receives a bond for title when he has paid the purchase-money, fail to pay according to the terms stipulated, the vendor may consider the contract at an end, and lawfully sell to a third person. *Holloway v. Moore*, 4 S. & M. 594.

24. Where the vendor of real estate gives a bond for title on payment of the purchase-money, and afterwards executes a deed to the vendee on his promise to give personal security for the purchase-money, which he fails to do, the vendor will still be entitled to his equitable lien, as between himself and the vendee; but where the vendee executes a deed of trust or mortgage upon the premises purchased, to one having no notice of the unpaid purchase-money, to secure a debt contracted by the vendee since his purchase, or a sale for value to one having no notice; the *cestui que trust*, or mortgagee, or purchaser, will hold the property discharged from the vendor's equitable lien; a different rule would prevail, if the deed of trust or mortgage were executed to secure a debt due by the vendee prior to his purchase; in such case the vendor's equitable lien would prevail. *Dunlap v. Burnett*, 5 S. & M. 702. It prevails against all but *bona fide* purchasers without notice; where, therefore, W. purchased a tract of land of H.,

and agreed to pay for it with other lands if title could be had to them, if not, with a stipulated sum, upon which H. conveyed the land to W.'s wife; the title to the other lands not being made, H. filed his bill against W. and wife to subject the land sold by him to the payment of the stipulated sum, the purchase-money thereof; *held*, that the land was subject to the vendor's lien. *Upshaw v. Hargrove*, 6 S. & M. 286.

25. A judgment is a lien only upon the actual interest the judgment debtor has in the property upon which it is attempted to enforce the judgment, and is subject to all the equities which exist at the time between third persons; therefore the judgment creditor of the vendee of real estate, the purchase-money of which has not been paid, cannot subject the land to his judgment, to the exclusion of the vendor's equitable lien. *Ib.*

26. Where a vendor of land has given a bond for title without affixing any time in which it is to be made, and takes notes payable at a fixed time for the purchase-money; and afterwards, but before the notes are paid, executes a defective deed to the vendee, he will not thereby be deprived of his right to recover upon the notes, as the execution of the defective deed does not absolve him from the obligation of his bond to make a good title, which the vendor may still demand. *Hazlip v. Noland*, 6 S. & M. 294.

27. Whether, where a vendee of land who has a bond for title from the vendor dies before paying the purchase-money, and his administrators are sued therefor, the administrators can object to a deed from the vendor, made, but not delivered before the vendee's death,

for insufficiency or imperfection, so as to call in question the validity of the title to the land, by way of assailing the consideration of the notes, *Quære?* *Ib.*

28. Whether, where a vendor, who has given a bond for title, recites in the deed conferring title, that he *grants, bargains and sells* the land; and in conclusion of the deed warrants the title only against himself and heirs, he thereby limits the statutory warranty given to the words *grant, bargain and sell?* *Hazlip v. Noland*, 6 S. & M. 294.

29. A warranty does not pass title, but only secures indemnity if there be incumbrances. A vendor of land, who has given a bond to make title, it seems therefore, may under some circumstances, comply with his bond, by giving a deed to the land with special warranty. *Ib.*

30. It is a general rule, that if there be a mere failure of consideration arising from the sale of a defective legal title, unmixed with fraud or bad faith, the vendee will be left to the covenants of warranty in his deed; where, therefore, M. W. entered a tract of land, and in January, 1837, assigned the certificate of entry to D., and in October, 1838, a judgment was rendered against M. W., under which the land was sold, and bought by H. in September, 1840, who sold by deed of warranty to W. in December, 1840; W. having, in 1839, bought the same land from D., to whom a patent issued for it, in December, 1841, and who conveyed it by deed to W. in May, 1844; W. filed a bill against H., alleging that H. misrepresented the nature of his title at the time of sale, and that he (W.) had been evicted by a paramount title, and prayed a rescission of the contract of sale from H. to

W.—H. denied the misrepresentation, and there was no proof of eviction; *held*, as there was neither fraud, mistake, nor eviction, W. must be left to his remedies at law. *Wilty v. Hightower*, 6 S. & M. 345.

31. The interest of the vendor in land, who has given a bond for title, on payment of the purchase-money, and who has received a portion thereof from the vendee, is not subject to seizure and a sale under execution, at law, at the suit of a judgment creditor who has obtained his judgment since the date of his title-bond and the payment of such portion of the purchase-money; in such case, the vendor has a lien on the land for the payment of the money, and the vendee a lien when he has paid the whole, or part of it, for the title, which will prevail against the lien of such judgment creditor; but it seems it will not prevail against a *bona fide* purchaser for valuable consideration and without notice; the extent of the right of such judgment creditor will be to subject to his debt the unpaid purchase-money in the hands of the vendee; the lien of the judgment operating only on the interest of the judgment debtor at the date of the judgment. *Money v. Dorsey*, 7 S. & M. 15; *Delafield v. Anderson*, 7 S. & M. 630; *Ellis v. Ward*, 7 S. & M. 651.

32. Where a bond for title is given, the interest of the vendee not being the subject of execution sale at law, unless he has paid all the purchase-money, it seems that a party to an ejectment suit claiming title through the purchase of the interest of such vendee, must show that the purchase-money has all been paid. *Harmon v. James*, 7 S. & M. 111.

33. A declaration by a vendee, who has received from his vendor a bond to make title on payment of the purchase-money, against the obligor therein, for a failure to make title, which neither avers that the vendee demanded a deed of the vendor, nor that the vendee prepared a deed and tendered it to the vendor and demanded its execution, is fatally defective. *Johnston v. Beard*, 7 S. & M. 214.

34. Whether a vendee with a bond for title can maintain an action against his vendor for a failure to make title, after having demanded a deed from him, or whether he must have prepared a deed and tendered it to the vendor and demanded its execution, *Quære? Ib.*

35. In cases free from fraud, a purchaser of land who is in possession, cannot have relief in chancery from his contract to pay, on the mere ground of a defect in title, without a previous eviction; a vendee in possession under a deed with warranty, with no fraud made manifest and with nothing to show that the vendor is not able to pay any damages that may be recovered against him, has no right to call his vendor into a court of equity to litigate an adverse legal title; he must rely on his covenants if he should be evicted; if he buys with a full knowledge of the defective title, he cannot be relieved from his contract to pay because of such defect. *Vick v. Percy*, 7 S. & M. 256; and if he has protected himself with covenants, he is not entitled to be relieved from his contract, if it be unmixed with fraud, until after eviction. *Walker v. Gilbert*, 7 S. & M. 456.

36. McG. purchased of the board of police of Ponola county, a lot in the town of Ponola, and took a bond

for title when the last instalment on the lot was paid; McG. sold the lot to W., and assigned him the title bond without any covenants on his part; W. contracting to pay the last instalment due by McG. to the board of police. E., under a judgment recovered by him against McG. after the assignment of the title bond to W., had the lot sold by the sheriff, and bought it himself, having full notice of the assignment of the bond to W.—E. then procured the board of police, by their president, to execute direct to him a deed to the lot, and he paid them the last instalment due by McG., and which W. had assumed the payment of; the board of police having notice also of the assignment of the bond to W. E. obtained possession of the lot, and put improvements upon it. W. filed a bill to have the deed to E. from the president of the board of police set aside and cancelled, and for a specific performance of his contract with the board of police; *held*, that W. was entitled to the relief sought, but that E. had a lien on the lot for the instalment paid by him to the board of police; and that he should be allowed for his improvements, to be applied to the extinction of the rent so far as they would go. *Ellis v. Ward*, 7 S. & M. 654.

37. Where a vendee takes from his vendor such title only as the vendor had, he cannot afterwards, for mere defect in title, obtain a rescission of the contract. *Pintard v. Martin*, 1 S. & M. Ch. 126.

38. Where by contract of sale of real estate, part of the purchase-money was to be paid down, and the remainder in instalments, secured by deed of trust, before the property was to be delivered; and only a portion of the cash payment

was made, and the property was delivered, and the deed of trust for the instalments taken; *held*, that the vendor had no equitable lien upon the land sold for the unpaid portion of the purchase-money agreed to be paid in cash; as the express lien reserved for part of the consideration excluded the idea of the implied lien for the residue; that the court in dismissing the vendor's bill, filed to enforce such supposed vendor's lien, will do so at the vendee's cost who occasioned the injury. *Phillips v. Sanderson*, 1 S. & M. Ch. 462.

39. Where covenants are mutual and dependent, and have been violated by one party thereto, and the other desires to absolve himself therefrom, he must offer to comply fully with his part of the contract before he can absolve himself therefrom; where, therefore, H. bought land of P. & L., and gave his notes for the purchase-money, and took their bond for title, and H. did not pay his notes when due, and P. & L. sold the land to B. & M., who had knowledge of the sale to H., and H. filed his bill offering to pay the notes and demanding title; *held*, that H. was entitled to the land upon payment of the notes, and that B. & M. held the title for the benefit of H. *Hines v. Baine*, 1 S. & M. Ch. 530.

40. Where a vendee is seeking relief in equity against his grantor in a deed on account of a failure in title to the property conveyed by the deed, a general charge of defect of title, without stating in what particular that defect consists, is not a sufficient charge to entitle him to any relief therefor. *Latham v. Morgan*, 1 S. & M. Ch. 611.

41. Where the vendee is let into possession under his deed, and no

eviction actual or threatened is charged, the allegation of the *insolvency* of the grantor, will not be sufficient to entitle the party to relief against a defect of title to the property. *Ib.*

42. Where the vendor of land represented himself as the assignee of certain Indians, entitled to reservations of lands, and upon that representation, made a sale of the lands; and on a bill filed by the vendee to rescind the contract on the ground that the representation was fraudulent and untrue; *held*, that, the vendor not exhibiting on the hearing any evidence of his title, and the vendee showing negatively a want of title in the vendor, the contract must be rescinded. *Wilkinson v. Davis*, Freem. Ch. 53.

43. See *Grant*; non compliance with conditions subsequent, defeats a grant, and the land reverts.

44. Where the purchase-money has been paid, and the vendee let into possession under a parol contract, and suffered to make valuable improvements, the case is taken out of the statute of frauds and a decree for a specific performance of the contract will be ordered. So also where the contract of sale is written out and one of the parties, after having agreed to do so, is prevented by death, unavoidable accident, or the fraud of one of the parties, from signing it. *Finucane v. Kearney*, Freem. Ch. 65.

45. If one buys a defective title knowing it to be so, and takes no covenant of title, he must abide the consequences. *Allen v. Hopson*, Freem. Ch. 276; and if there is no fraud, even if the title wholly fails, he has no relief either at law or equity; and if the vendee seeks

to enjoin the payment of the purchase-money on the ground of fraud in the vendor, he must pray for a *rescission of the contract*; and on a bill merely praying for injunction, no relief can be given. *Williamson v. Raney*, Freem. Ch. 112.

46. A vendee who has taken a bond for title, on payment of the purchase-money, cannot enjoin the collection thereof, on the ground of want of title in the vendor, unless he has tendered the vendor the purchase-money and demanded a deed, and the vendor is unable to comply. *Mitchell v. Sherman*, Freem. Ch. 120.

47. The rule in relation to executory contracts for the conveyance of lands, is, that if the vendor fail to convey, according to the terms of his contract, the measure of damages, is the value of the land at the time of the breach, and not the price fixed in the contract; it is otherwise, where the contract is *executed*, there the purchase-moneys, with interest, is the measure of damages. *Gridley v. Tucker*, Freem. Ch. 209.

48. See *Fraud*, 42; for what is undue concealment on the part of the vendee, to procure vendor to make deed.

49. A vendee who buys up and discharges an incumbrance, can only claim against his vendor the amount actually paid; where therefore, A. sold B. a lot of ground, and took a deed of trust, to secure the purchase-money, and there was at the time a judgment for a small amount against A. older than the sale to B; and the lot being levied on under that judgment, B. procured C. to bid it off for him, and then before the sheriff made a deed to C., B. sold the lot to D., and the sheriff made the deed direct to D.

who had notice, or did not deny notice of the claim of A.; *held*, that the lot in the hands of D. was subject to the deed of trust, in favor of A., after deducting what the lot sold for at the execution sale. *Harper v. Reno*, Freem. Ch. 323.

50. A vendee of land having a mere bond for title, and the purchase-money not paid, has no such interest as is the subject of seizure and sale under execution at law; yet where the vendor in such case has obtained a judgment at law for the unpaid purchase-money, and levies on the land sold, and sells the same under his execution to a third party, the vendor cannot object to the legality of the sale, nor enforce in equity his vendor's lien for what yet remains due after such sale, of the purchase-money; the vendor will be considered as having elected that mode of enforcing his lien, and will be decreed to convey the legal title still in him to the purchaser at the execution sale. *Thompson v. McGill*, Freem. Ch. 401.

51. Although the vendor's equitable lien is not assignable yet if a lien for the purchase-money be expressly retained in the face of the notes and the deed, an assignment of the note will also carry with it an assignment of the lien. *Briggs v. The Planters Bank*, Freem. Ch. 574.

52. A rescission of a contract on account of alleged defect of title, will not be granted where at the hearing of the case, it is apparent a perfect title may be had, and no fraud is alleged or proved. *Fletcher v. Wilson*, 1 S. & M. Ch. 376.

53. A person selling property under a defective claim, afterwards by purchase or descent acquires a

perfect title, *held*, that that title will accrue to the benefit of the vendee. *Ib.*

54. As a general rule, a court of equity will not rescind a contract for mere defect of title, where the vendor has been guilty of no fraud, mistake or misrepresentation, unless at the time of the decree, it appears that the vendor is totally unable to make title, and there is no adequate remedy at law. *Ib.*

55. A defendant, discovering a defect in his title, should at once, if he design doing so at all, surrender the possession of the property and demand a rescission, and his neglect to do so is a waiver of his right to a rescission. *Ib.*

VENUE.

1. It is error to refuse to change the venue, when the defendant makes oath that he is a resident freeholder of a different county from that in which the action is instituted. *Spain v. Winter*, Walk.

152. But whether, on the death of the defendant, and a *sci. fa.* against his representatives, they can change the venue, on the ground that they are freeholders of a different county, *quære?* *Neeley v. Planters Bank*, 4 S. & M. 113. And where all the defendants live out of the county where they are sued, the case will be dismissed, and not the venue changed. *Bank of Vicksburg v. Jennings*, 5 How. 425.

2. See *Practice*, 17; as to power of parties to change venue by consent.

3. On a change of venue, a writ of error, after verdict, will not, it seems, reach a defect in the original panel of the grand jury, es-

pecially where that panel was not made part of the record by bill of exceptions. See *Circuit Court*, 2 and 3. *Byrd v. State*, 1 How. 247.

4. Where a venue in a cause is changed, the order of the court granting the change must appear affirmatively in the record; the recital of the clerk that the venue was changed, will be insufficient to give the other court jurisdiction. *Saunders v. Morse*, 3 How. 101.

5. It is too late, after a trial below, to object to the jurisdiction of the court below, on the ground that the record does not show a regular change of venue; such objection should have been made below; it will not be regarded in the high court of errors and appeals. *Prussel v. Knowles*, 4 How. 90.

6. Where a change of venue was moved for in the court below, and the motion not disposed of, it will be held to have been waived. The affidavit for a change of venue is no part of the record, unless made so by bill of exceptions. *Grant v. Planters Bank*, 4 How. 326.

7. Where the prisoner has applied for and obtained a change of venue, he cannot question the regularity of the proceeding; if the record be silent on the subject, the court will presume it to have been regularly done. *Loper v. State*, 3 How. 429.

8. See *Board of Police*, 6; does not apply to appeals from the board of police.

VERDICT.

1. Verdict without an issue, or judgment by default with writ of inquiry, erroneous. *Hendricks v. Snodgrass*, Walk. 86; *Horn v. Gillock*, *Ib.* 107; *Wilkinson v.*

Patterson, 6 How. 193; *Harrison v. Agricultural Bank*, 2 S. & M. 307.

2. See *New Trial*, 6, 7, 8, 9; verdict erroneous, if jury take out paper not read on the trial, or separate, even with an officer, without permission of court. *Taylor v. Sorsby*, Walk. 97; *Offit v. Vick*, *Ib.* 99.

3. A verdict without the judgment of the court upon it, will not sustain the plea of former recovery. *Butler v. Stephens*, Walk. 219.

4. See *Jury*, 4 and 5; as to when verdict erroneous for want of their being sworn.

5. Verdicts, substantially good, may be moulded into proper form; thus, "we the jury find for plaintiff," will be a good verdict, though there were two issues of fact, and the jury were only sworn to try "the issue joined." *Montgomery v. Tiltonson*, 1 How. 215.

6. The verdict in these words: "We of the jury find for the plaintiff, the debt in the declaration mentioned, to be discharged by the payment of the same," &c., is sufficient. *Maulding v. Rigby*, 1 How. 579; *Ib.* 4 How. 222.

7. A verdict in action on a coroner's bond: "We find for the plaintiff, the debt in the declaration mentioned, which may be discharged by the payment of the sum of \$318 49;" sufficiently formal to show the amount of damages assessed. *Longacre v. State*, 2 How. 637.

8. A verdict cures immaterial issue. *Chichester v. Daggett*, 2 How. 863.

9. Where the verdict on an issue which presents a negative pregnant, shows for which party judgment ought to be rendered, the error is cured by the statute of jeo-

fails. *Carmichael v. Browder*, 4 How. 431.

10. See *Amendment*, 6; when verdict may be amended after jury retired.

11. See *Trial of Right of Property*, 5 and 6; for form of verdict in, and power of court to alter, and the necessity of its conforming to the issue.

12. A verdict by the jury in favor of the *plaintiff*, instead of *plaintiffs*, when the record shows they were empanelled to try the issue in the case at bar, is sufficient. *Henry v. Halsey*, 5 S. & M. 573.

13. See *Jury*, 34; verdict irregular, made by agreement that each jurymen should assess a sum, and the division of the aggregate sums by twelve be the verdict.

VICE-CHANCERY COURT.

1. The constitution of the state provides that there shall be "a separate superior court of chancery, with full jurisdiction in all matters of equity;" it also provides, after establishing the circuit, probate, and other courts, that "the legislature might, from time to time, establish such other inferior courts as might be deemed necessary, and abolish the same

whenever they should deem it expedient." The legislature, in 1842, established an "inferior court of chancery," having but a district jurisdiction, concurrent with that of the superior court of chancery, which was general; its jurisdiction was limited in amount; those residing out of the district could remove causes pending in the inferior to the superior court, and in all cases there was an appeal to the superior court of chancery; *held*, that the act was *constitutional*. *Houston v. Royston*, 7 How. 543.

2. Where the constitution provided that all officers should be elected, and hold their offices for a limited time, and the law establishing the vice-chancery court, provided that the vice-chancellor should hold his office until the next general election, *and until his successor was qualified*, and the law made no provision for the appointment of his successor; *held*, that the first vice-chancellor would hold until Nov. 1843, when the office would become vacant, and remain so until the legislature should provide for filling the vacancy; that portion of the law authorizing him to hold over until his successor was qualified being *unconstitutional*. *Ib.*

W.

WAIVER.

A waiver, in the record, in these terms: "came the parties by their

attorneys, and the defendant waives all service of any writ and pleadings;" estops the party from assigning for error, the want of writ

and pleadings or of authority in the attorney. *Walker v. King*, 1 How. 17. Appearance and plea cures defect in process. *Stevens v. Richer*, 1 How. 522.

WARRANTY.

1. See *Trover*, 4; as to action on warranty of soundness, by vendee of unsound slave, where vendee has resold before action brought. *Texada v. Camp*, Walk. 150.

2. In an action for breach of warranty, *scienter* need not be proved if averred. *McLeod v. Tutt*, 1 How. 288; so also in plea in bar of warranty and breach of it. *Williams v. Harris*, 2 How. 627.

3. See *Pleading*, 42; how warranty must be pleaded.

4. Any words which amount to an affirmation of soundness, is a good warranty; the word "*warrant*" need not be proved; a bill of sale, therefore, representing negroes as *sound* in *body* and *mind*, is a good warranty; it is the province of the jury to say whether the affirmation in a particular case amounts to a warranty or to an assertion merely. *Kinley v. Fitzpatrick*, 4 How. 59; *Anderson v. Burnett*, 5 How. 165.

5. A judgment against the vendee of slaves, with warranty, in favor of a third person suing for the slaves, is a breach of the warranty of the vendor, for which an action may be maintained. *Pickett v. Ford*, 4 How. 246.

6. Where there is a warranty of title given on the sale of personal property, and the possession of the vendee remains undisturbed, he cannot set up a want of title to the personalty, as a bar to the re-

covery of the purchase-money; it seems it would be otherwise in case of implied warranty. *Brown v. Smith*, 5 How. 387.

7. It seems that where there is a warranty of title of personal property, and it is afterwards taken out of the possession of the vendee by execution against the vendor, the measure of damages would be the value of the personalty at the time it was taken out of the possession of the vendee; *semble* a different rule, if the warranty was broken by paramount title in some third person recovering the negroes. *Bozman v. Brown*, 6 How. 349.

8. In an action upon a warranty of soundness of a slave, where the only proof of the warranty was, that the defendant, when told of the unsoundness, and requested to take the slave back, told the plaintiff "he was not in a situation to take care of her, but if he would keep her, and she died, he would pay all expenses and it should be his loss," it was *held* sufficient to uphold the verdict for plaintiff. *Munn v. Perkins*, 1 S. & M. 412.

9. Every workman, who contracts to do a piece of work, thereby impliedly warrants that he will bring sufficient skill and dexterity to its performance to complete it in a just and workmanlike manner, and if he do not do so, he is not entitled to recover pay for it. *Leflore v. Justice*, 1 S. & M. 381.

10. It is competent to prove a parol warranty of title and soundness of a slave sold without bill of sale. *Houston v. Burney*, 2 S. & M. 583.

11. The assignment by the vendor to his vendee, of the bill of sale of his own vendor, containing

a clause of warranty, is not of itself evidence of a warranty. *Ib.*

12. The following words in a bill of sale of negroes, viz. : " which negroes I warrant sound and healthy in body and mind, so far as I know or believe," constitute unlimited warranty of soundness. *Colins v. McCargo*, 6 S. & M. 128.

13. See *Slaves*, 19. No action can be brought for a breach of warranty of slaves introduced and sold in this state since May, 1833.

14. See *Vendor and Vendee*, 28, 29; whether a deed with special warranty is in any case a compliance with a bond to make title.

WASTE.

A bill for an injunction to stay waste, threatened to be committed on lands by one in possession under adverse claim, will not lie; perhaps *aliter*, in case of lawless trespasser without color of title; an injunction will not be granted to stay waste, except in cases where irreparable injury will be sustained; and not where there is adequate remedy at law. *Poin-dexter v. Henderson*, Walk. 176; *Nevitt v. Gillespie*, 1 How. 108.

WHARFAGE.

The owner of the soil on the bank of a river, has a right to charge wharfage for the use of a portion of it. *O'Conley v. The City of Natchez*, 1 S. & M. 31. See also, *Morgan v. Reading*, 3 S. & M. 366.

WILL.

1. A probated will is operative till revoked by the proper tribunal. *Herrington v. Herrington*, Walk. 322.

2. Two witnesses must be present when a nuncupative will is made. *Gibson v. Gibson*, Walk. 364.

3. No words will constitute a nuncupative will, without the *animus testandi*; where, therefore, a man, when on his sick bed, when asked how he wished his property to go, if he died, stated the disposition he wished made; and on the next day, on being asked the same question, inquired if he had power to make a will, and on being answered in the affirmative, stated a different disposition from that of the day before, the first disposition cannot be established as his will. *Ib.*

4. See *Deed*, 6, as to whether instrument will or deed.

5. G. having, in 1829, made a will in Alabama, moved to Mississippi, and, in 1831, executed a second will; about two months previous to his death he expressed an intention of revoking his last will, and again disposing of his effects, and for this purpose applied to B. to write a *new will*, presenting, at the same time, the will of 1831, in which there were interlineations and erasures, which he pointed out, and also objected to other provisions in the will; he stated to B. that he had done away that will, and that the interlineations and erasures were made by his directions. B., having taken a memorandum of the additions G. wanted made, took away the will of 1831, to draft a new one by; in this conversation G. said that if B. should not write a new will, the will of 1829 should

go into effect. G. died before executing a new will; *held*, that he died intestate; the will of 1831 being revoked, and that of 1829 not revived. *Bohanon v. Walcot*, 1 How. 336.

6. The revocation of a subsequent does not revive a former will, either expressly or impliedly revoked by the subsequent one; it requires some express act to revive or adopt a revoked will. *Ib.*

7. V., by his will, gave all his personal estate, in equal shares, to his wife and children, and made a farther provision for his wife; and gave all his lands to his sons; and directed his executors to lay off two hundred acres of his land, at their discretion, into town lots, with a direction to them "to remember that the town lots now laid off in the forementioned two hundred acres of land, should be sold to pay his just debts, and other engagements, in preference to any other of his property, for the use and benefit of all his heirs;" he died, leaving nine daughters and four sons; it was *held*, that the daughters had no interest whatever in the two hundred acres, by the devise of their father; it went to the sons. *Vick v. The City of Vicksburg*, 1 How. 379.

8. M., by his will, devised three-eighths of all his estate to his brother, gave several pecuniary legacies, one specific legacy, and directed the residue of his estate to be divided between his nephews and nieces, but said nothing about payment of his debts; *held*, that the brother was only entitled to three-eighths of what remained of M.'s estate, after payment of all debts. *Fisk v. McNeil*, 1 How. 535.

9. See *Chancery*, 70; a court of

chancery refused to declare a paper, on its face a will, to be a deed of gift.

10. Under the constitution and statutes of this state, the superior court of chancery has no jurisdiction over the subject of wills; it is confined to the probate court. *Cowden v. Cowden*, 2 How. 806.

11. Where a will conveyed certain slaves to A., for life, and directed that, after her death they should fall into the testator's estate, a proportionate part of which he left to S. and W.; *held*, that, upon the death of A., S. and W. could not sue for and recover the slaves bequeathed to A. for life, as a specific legacy to them. *Minor v. Stewart*, 2 How. 912; *semble*, *Magruder v. Stewart*, 4 How. 204.

12. Adults have five years after the probate of a will, and infants five years after they come of age, to contest the validity of the will; and if the validity of a will be contested in the manner pointed out by the statute, either before or after probate, whether there be infants or not, the decree is absolute against all persons, whether parties to the issue to ascertain the validity of the will, or not. The decree is conclusive against all the world, unless it can be impeached on the ground of fraud and collusion. *Scott v. Calvit*, 3 How. 148.

13. Where the testator, by his will, directed his property to be kept together, in the hands of his executors, until his only daughter became of lawful age, or married, and that then his property should be equally divided between his wife and daughter; *held*, that the wife of the testator had by the will a vested legacy in the property, which would pass to her second

husband on his marriage with her, and taking possession of the property, and on his death the children of the second marriage would be entitled to two-thirds of the legacy; and if the second husband administers on the first husband's estate, after renunciation of the executors, but claims the property in his own right, by the marriage, his possession of it will be a sufficient reduction to possession, to prevent the right from surviving to the widow on his death. *Scott v. James*, 3 How. 307; to the same effect is *Wade v. Grimes*, 7 How. 425.

14. A clause in a will manumitting slaves, is void, and the slaves will go to the residuary legatee, and not to the heir at law. *Vick v. McDaniel*, 3 How. 337; *Luckey v. Dykes*, 2 S. & M. 60.

15. See *Merger*, 1, for construction of will where testator left his sole heir a life estate in slaves, and made no provision for the remainder.

16. Where a will is made during a lucid interval in the madness of the testator, it will be binding and valid; and the testimony of the subscribing witnesses to the will is entitled to greater weight than that of others who had not that duty to perform. *Brock v. Luckett*, 4 How. 459.

17. Where a testator converses rationally, and shows an understanding of his affairs, it is evidence of a lucid interval. *Ib.* See this case for the circumstances under which a will was held valid, as being made in a lucid interval, where testator was insane both before and after.

18. Although an issue to a jury ought properly to be granted to test the validity of a will, as to the sanity of the testator, the probate

judge is competent to decide, and when his mind is satisfied, from the evidence of those who wrote the will and were the subscribing witnesses, that the testator was sane at the time, it will not be error for him to refuse to hear other circumstantial testimony, to establish the testator's insanity. *Ib.*

19. Where a will directed the executors to transport to the coast of Africa, such of the slaves of the testator as should elect to go, there to be settled in Liberia, and remain free, it was held, to be a valid disposition of the property, and a trust which the executors could not rightfully be restrained from executing; that it was not against the policy of the state of Mississippi for the owner of slaves to send them out of the state for manumission; so he might direct it to be done by his will; it would be otherwise if the slaves were to remain in this state. *Ross v. Vertner*, 5 How. 305; *Ib.* Freem. Ch. 587. So where the testator by his will, in 1836, directed his slaves to be set free, and sent to Indiana, or Liberia, as they might prefer, and directed also the sale of his property, and part of the proceeds to be paid to the slaves thus liberated; held, that the will was valid, and the executor could proceed in its execution; and that the bequest of property to the slaves was not void for want of capacity in them to take; if they did not comply with the terms of the will the bequest was void, if they did, it was valid. *Leech v. Cooley*, 6 S. & M. 93.

20. N., by her last will, left certain slaves to B., upon condition that B. would pay to the guardian of the three children of I., deceased, a fixed yearly sum, and on their respective arrivals at majority,

would pay them each the one-third part of four thousand dollars ; B. accepted the legacy, and the probate court required her to give surety for the payment of the sums required to be paid by the will ; *held*, that B.'s interest in the slaves was an estate upon condition subsequent ; and that the pecuniary legacies to the children were a charge upon the slaves, and constituted a lien upon them, and that B. could not be compelled to give security, unless she was about to commit waste, or do other injury to the estate ; when the remainder-men might interpose. *Beck v. Montgomery*, 7 How. 39.

21. The court of probate has exclusive jurisdiction to award an issue of *devisavit vel non*. *Hamberlin v. Terry*, 7 How. 143.

22. Under the statute in this state, on the subject of wills, which requires that where the will is not wholly in the handwriting of the testator, it shall, in order to be a valid will, as to realty, be attested by three witnesses, and as to personalty by two ; a will attested only by two witnesses, by which both real and personal estate is devised, is valid as to the disposition of the personalty, but void as to that of the realty. *Chapman v. Brown*, 7 How. 636.

23. B., by will, directed that her executor should represent to the legislature the meritorious services of her negro slave, and should procure from the legislature an act for his emancipation, and should take charge of her slave, and give him the benefit of his own labor, until he could procure the passage of the act ; *held*, that the testatrix did not thereby profess to emancipate the slave, and that that clause of the will was not void ; if the legislature

would not pass the act, the slave would fall into the residue of the estate ; the will did not create an unlimited trust in the executor, if any trust at all, but merely until the period of the action of the legislature on the subject. *Shaltuck v. Young*, 2 S. & M. 30.

24. Although the general rule is, that whatever by lapse, invalid disposition, or other casualty, falls into the estate, after the date of the will, goes to the residuary legatee, and not the next of kin ; yet that rule will not apply, where it appears from the whole will that the persons constituted residuary legatees were only to be such of such property as was ordered to be sold, the next of kin in such case would take what, by a void devise, would fall into the residue. *Luckey v. Dykes*, 2 S. & M. 60.

25. Where, by the terms of the will, the whole estate, real and personal, of the testator, if left subject to sale, at the discretion of the executor, if, in his opinion, it would be for the interest of the estate to do so, is the real estate thereby converted into personalty ? *Hart v. Dunbar*, 4 S. & M. 273.

26. The first probate of a will, by the probate court, is a mere incipient step, necessary to enable the court to adopt the means to carry it into execution, but it is not conclusive on heirs and distributees, and may be opened, and set aside. J. C. died in 1832, and in the same year a paper, claimed to be his will, was duly probated, and letters testamentary granted to his widow ; I. I. C., the son of J. C., was a minor, when the alleged will was probated, but his then guardian appeared and contested it in his behalf ; in 1843, within three years after J. C. became of age, he filed

a petition in the probate court, that had probated the will, denying the validity of the will, and praying for an issue *devisavit vel non*; *held*, that the object of the petition, to obtain a re-probate of the will, was a legitimate and legal one, and the mode pursued for that end, the correct one. *Cowden v. Dobyns*, 5 S. & M. 82.

27. Where a will, made in another state, is probated there, and the testator has property in this state; and a copy of the probated will is admitted to probate in this state, according to the statute, a certified copy of the probated copy of the will, from the probate court in this state, will be admissible evidence of the will. *Montgomery v. Millikin*, 5 S. & M. 151.

28. Where the testator directed certain lots of ground to be sold by his executor, if, in the opinion of the executor, it should be advisable, to accomplish the purposes of the will, it seems that this is a discretionary power, conferred upon the executor personally, and cannot be exercised by the administrator, *C. T. A. Ib.*

29. It is the policy of the law of Louisiana to give effect to the intention of the testator, whenever it can be gathered from the will; and where a testator is inhibited by law from bequeathing over a definite amount to persons holding a certain relation to him, and he exceeds that amount, through ignorance of the law, or other cause, the bequest will not be void, but that part which exceeds the disposable portion will be reduced to the disposable amount, and held valid so far; for a bequest in that state of a greater interest in property than that which the law authorizes, but which is capable of reduction or

conversion to the legal standard, is not void, unless some law has rendered it *illegal*, or it is contrary to the spirit of the law; where, therefore, by the law of Louisiana, a person who has married a second wife, and who has children by a former wife, and is inhibited by law from leaving his widow more than one-fifth of his estate, and that only as an *usufruct*, makes a will, leaving to his wife a large sum of money absolutely, the legacy will not be void, but must be converted from the bequest of an absolute sum, into its equivalent of *usufruct*; the proportion that the *usufruct* bears to the absolute estate, where *usufruct* and absolute property are marshalled, is, that the *usufruct* of the whole is equal to the right of property of the half, and in that ratio. *Ib.*

30. A., domiciled in Louisiana, died, leaving a second wife and children by his first wife surviving him; by his will he gave five thousand dollars in fee to his second wife; *held*, that the testator being prohibited by law from leaving to his wife more than the *usufruct* of one fifth of his estate, and five thousand dollars absolutely being equal to the *usufruct* of ten thousand dollars, the widow should have the *usufruct* of ten thousand dollars, if it did not exceed one fifth of the value of the whole estate; and if it did exceed one fifth of the value of the estate, then the widow should have the *usufruct* of that fifth. *Ib.*

31. If trusts, which arise under a will, be of a character that require equitable interposition, the fact that they were created by a will cannot exclude the jurisdiction of equity. *Wade v. The American Colonization Society*, 7 S. & M. 663.

32. If the probate court cannot grant full and adequate relief in cases of trust arising under a will, the chancery court may take jurisdiction. *Ib.*

33. R., by his will, directed that after his decease his slaves should be called together, and such of them, as elected to go to Africa, the provisions of the will being first fully explained to them, should be sent there under the directions and superintendence of the American Colonization Society; that such of his slaves as did not elect to go to Africa, together with all the residue of his estate, except a few slaves particularly mentioned, should be sold, and the proceeds, after the payment of certain legacies and all necessary expenses, be paid over to the American Colonization Society, to be appropriated first to paying the expenses of transporting his slaves to Africa, and secondly to their support and maintenance when there. The executors refused to sell any portion of the estate, or to deliver the slaves to the American Colonization Society, as directed by the will, because, as they contended, the trusts created by the will were in violation of the policy of this state and in fraud of the statute on the subject of manumission, and therefore illegal and void; and the American Colonization Society filed a bill in the superior court of chancery against the executors, to compel the execution of the trusts and to carry out the provisions of the will. The executors resisted the bill on the further ground that it related to a matter purely of administration, and cognizable only in the probate court; *held*, that the trusts created by the will were legal and valid; that the full measure of relief could

only be attained in a court of equity, and therefore the court of chancery had jurisdiction. *Ib.*

34. Bequests made to slaves who are directed by the will to be transported to Africa and remain there, are not void for want of capacity in the legatees to take; the slaves have an inchoate right to freedom under the will, which is complete as soon as they are removed out of this state. *Ib.*

35. Where a will directs that the slaves of the testator shall be transported to Africa, under the direction and superintendence of the American Colonization Society, and that the executors shall sell certain portions of the estate, and pay over the proceeds to the Colonization Society, to be used by them in paying the expenses of transporting the slaves to Africa, and for their support and maintenance when there; the trusts are not void for want of capacity in the American Colonization Society to take for such purpose. *Ib.*

36. The American Colonization Society filed a bill against the executors of R., alleging that R., by his last will, directed his slaves to be sent to Africa under the superintendence and direction of complainants, and that the executors should sell certain portions of his estate and pay over the proceeds to complainants, provided they would agree to appropriate the same to paying the expenses of transporting the slaves to Africa, and supporting and maintaining them when there; that the complainants were duly and legally incorporated; that they were willing to accept and appropriate the funds as provided for in the will—the object of the society, by their charter, being in accordance with the provisions of the will

and in furtherance thereof; that by the decisions of the courts the will and provisions were fully established, and the rights of complainants to the slaves and estate, in trust, as bequeathed in the will, and for the purposes therein contained, were fully confirmed, &c.; the executors demurred to the bill because there was no averment that the complainants were an incorporated society at the time of the testator's death, and because the complainants had no power or authority under their charter to take for the purposes and objects mentioned in the will—the chancellor disallowed the demurrer; *held*, that the demurrer was properly disallowed. *Ib.*

37. It is only when the bequest or devise is too vague or indefinite for those intended to be benefited, to claim any interest under them, that the doctrine as to charities arises; definite charities are trusts, which equity will execute by virtue of its ordinary jurisdiction. *Ib.*

38. Whether the statute 43 Elizabeth, is in force in this state, and whether the court of chancery has any jurisdiction over charities to compel their performance apart from, and independent of that statute, *quære?* *Ib.*

39. Where a testator directs, in his will, that his slaves shall be transported to Africa, under the superintendence of the American Colonization Society, and that the executors shall sell certain portions of the estate, and pay over the proceeds to the society, to be applied by them to the payment of expenses incurred in transporting the slaves to Africa, and supporting them when there, both the executors and society are constituted trustees; it is the duty of the ex-

ecutors to deliver the slaves to the society for the purposes of the will, and it is the duty of the society to carry out these purposes; and if the executors will not discharge their duty, and interpose obstacles to the execution of the trust by the society, clearly a court of equity may enforce the performance. *Ib.*

40. Whether, if a testator, in his will, directs that his slaves shall be sent to Africa, and the will constitutes no trustee to take them, any remedy exists to the slave, *quære?* *Ib.*

41. The American Colonization Society is not prohibited, by its charter, from transporting slaves, directed by a will to be sent to Africa, under the superintendence of the society. *Ib.*

42. If an incorporation be appointed a trustee, to execute trusts arising under a will, which are in themselves valid in point of law, neither the heirs of the testator nor any other private person can inquire into or contest the right of the corporation; that could only be done by the state which granted the charter. *Ib.*

43. By the will of R., his slaves were directed to be transported to Africa, under the direction and superintendence of the American Colonization Society; the provisions of the will were declared valid, by the judgment of the high court of errors and appeals, and the slaves declared entitled to an inchoate right of freedom, which would be perfect by their removal from the state. The legislature, subsequently, in 1842, passed an act, giving twelve months for the removal of slaves theretofore liberated, and declaring the bequest of freedom void, if they were not so

removed. One of the executors of R. detained the slaves in this state, against their will, and against the will of the society, and of his co-executors, until the twelve months allowed by the act of 1842 expired; before the twelve months, however, had expired, the society, after using every means in its power to comply with the requisitions of the act, without suit, filed a bill to compel the executor to execute the trusts created by the will; *held*, that the acts of the executor constituted such a fraud, that neither he nor any one claiming, by virtue of his acts, acquired any right; that the fraud of the executor placed him beyond the pale of the act of 1842, and that act did not, therefore, apply to the case. *Ib.*

44. Whether the act of 1842, giving twelve months from and after its passage for the removal of slaves *theretofore* liberated, or directed by any last will and testament to be sent beyond the limits of this state, and declaring all such bequests of freedom to be void if the slaves be not so removed, is valid and constitutional as to cases arising under will duly proved and admitted to record before its passage, *quære?* *Ib.*

45. Where the testator, in his will, gave the executor a discretion to sell a portion of his realty, but did not direct an absolute sale; *held*, that the realty was not thereby converted into personalty; and that a pecuniary legacy was not chargeable thereon, unless so expressly provided by the testator. *Montgomery v. Millikin*, 1 S. & M. Ch. 495.

46. If the probate of a will has been obtained by fraud or surprise, the probate courts in this state

have power, upon a proper showing, to vacate the probate thus irregularly obtained, examine the whole matter *de novo*, and decide accordingly. *Hamberlin v. Terry*, 1 S. & M. Ch. 589.

47. The probate courts in this state have, under our constitution, sole jurisdiction of the subject of wills; a jurisdiction at least commensurate with that of the ecclesiastical courts of Great Britain; and the court of chancery has no power in this state to declare the probate of a will void, even though charged to have been procured by fraud; such power belongs exclusively to the probate courts. *Ib.*

48. H. and others filed their bill, stating that the will of their ancestor, made in a fit of lunacy, had been probated by fraud, and praying that the court of chancery would set the probate aside; the will contained a clause emancipating the slaves which remained in the hands of the executor, and also constituted a residuary legatee, who was not made a party to the bill; *held*, that though the court of chancery had no jurisdiction to set aside the probate of the will, yet that the emancipation of the slaves was a *void* bequest, and to that extent the court would have had jurisdiction, if the residuary legatee had been a party to the proceedings. *Ib.*

49. All personal property of a testator, not disposed of, or ill disposed of, that, by lapse, or void bequest for illegality, does not pass as directed by the testator, goes to the residuary legatee; a different rule prevails as to real estate. *Ib.*

50. Where a testator authorized his executors, by his will, to raise money through *banks*, and to give

liens on his estate to secure such indorsers as they might be compelled to procure; and the executors raised money from commission merchants and gave them a deed of trust on the property, to secure them, it was *held* not to be such a compliance with the power as could be sustained in equity. *Ford v. Russell*, Freem. Ch. 42.

51. Courts of equity have jurisdiction to correct mistakes or obvious omissions in a will, but they must be such as are demonstrable from the scope and structure of the will, or as are readily pointed out by a plain construction of its terms; it cannot, therefore, correct the omission of the testator to attest the will with three witnesses. *Nutt v. Nutt*, Freem. Ch. 128.

52. A will attested by two witnesses, though void as to the reality, is valid as to the personalty. *Ib.*

53. Where a testator by his will, devises all his real and personal estate to the same person, and the will is void as to the realty, but good as to the personalty, and the testator charges the real and personal estate thus devised with the payment of divers legacies, and the legatees would take the realty, as heirs, but for the will, if the will be void as to the realty, but valid as to the personalty, a court of equity would take jurisdiction to compel an abatement of the amount of the legacies to the extent of the value of the land, at the rate the legacies bear to the value of the whole estate; or else to compel the legatees to the abatement, or to elect to take the legacies and give a release to the land. The rule would be different if the real estate were devised *from* the heir and the personal estate to the heir. *Ib.*

WITNESS.

1. See *Evidence*, tit. (j.) *Who competent, and what disqualifies*; as to what disqualifies a witness.

2. See *New Trial*, 7, 8; as to examining witness except in open court. *Offit v. Vick*, Walk. 99.

WRIT OF ERROR.

1. An irregularity in an execution which has issued against an administrator, without revival, on a judgment against the intestate, cannot be taken advantage of by writ of error; that writ lying to correct errors in the judgment of the court, and not irregularities of its clerks. *Hicks v. Murphy*, Walk. 66.

2. The mode of reaching the irregularity is by motion or *audita querela* in the court below, unless the execution issued by order of such court, when a writ of error would lie. *Ib.*

3. See *Appearance*, 1; as to how far want of original process after appearance and plea, can be taken advantage of by writ of error. *Delahuff v. Reed*, Walk. 74.

4. No writ of error lies, under the law organizing the criminal court of Adams county, from that court to the supreme court. *State v. Holmes*, Walk. 415.

5. A release of error must be formally plead, to bar a writ of error; it cannot be taken advantage of by motion. *Vick v. Maulding*, 1 How. 217.

6. Without a writ of error or an appeal, the high court will have no jurisdiction of a case, even though the record be filed and citation served. *Devane v. Calching*, 2 How. 884.

7. Where a citation has been

lost a writ of error will be dismissed, if the plaintiff therein do not have the citation renewed within fifteen days after he arrives at the knowledge of the loss of the first citation. *Newell v. Briggs*, 3 How. 45.

8. The indorsement on a citation on a writ of error, by the clerk of the inferior court, that he acknowledged service of the citation by direction of the defendant, is not a good service. *Cox v. Wadlington*, 3 How. 57.

9. The writ of error bond must conform to the statutory condition, which is, that the plaintiff shall prosecute his writ to effect and pay the judgment or decree, damages, interest and costs, in case it be affirmed, and also to perform the judgment and decree of the high court; a bond therefore conditioned to prosecute the writ of error with effect, or failing therein, to pay and satisfy the judgment of the court with all damages, interests and costs which the high court might award in the premises, is insufficient. *Rogers v. Gallaway*, 3 How. 58.

10. Any person interested in a judgment, or whose interest is affected by it, may prosecute a writ of error; a purchaser of land at sheriff's sale, may therefore prosecute a writ of error from a judgment of the court setting the sale aside. *Flournoy v. Smith*, 3 How. 62.

11. A writ of error and citation, issuing under the act of 1837, from a circuit clerk, tested in the name of the chief justice of the state, under the seal of the circuit court is regular. *Trahern v. Shackelford*, 3 How. 73. *Query?* if tested by circuit judge. *Coleman v. Tidwell*, 5 How. 12. The court will permit its amendment, if so

tested. *Demoss v. Camp*, 5 How. 516.

12. A writ of error will not lie from a judgment on a voluntary nonsuit. *Ewing v. Glidwell*, 3 How. 332.

13. The statute which gives the clerks of the circuit and chancery courts power to grant citations is merely cumulative, and does not take away that power from the high court of errors and appeals; and where that court has ordered an alias citation, upon the nonservice of the first, the propriety of the order cannot be questioned at the next term of the court after its entry. *Natchez Ins. Co. v. Stanton*, 4 How. 7.

14. After a forthcoming bond has been forfeited, no writ of error can be prosecuted; where, therefore, a judgment has been rendered against three persons, and two have given a forthcoming bond, none of them can prosecute a writ of error, the judgment not being in force against the party not giving the bond. *Sanders v. McDowell*, 4 How. 9; but *aliter*; if the bond has not been forfeited, the writ of error will lie. *Davis v. Jordon*, 5 How. 295.

15. The writ of error must be in the name of all the defendants; if it is not it will be quashed; if one party wishes to prosecute the writ alone, he must do so in the name of all, and if they will not unite in assigning errors, he can have a summons and severance from them. *Flournoy v. Burke*, 4 How. 337. *Henderson v. Wilson*, 4 S. & M. 732. *Preira v. Silva*, 4 S. & M. 735.

16. A copy of the citation left at the office of the attorney is insufficient service. *Coleman v. Tidwell*, 5 How. 12.

17. A writ of error will lie from a judgment of the circuit court refusing to quash a forthcoming bond. *Bank of the United States v. Patton*, 5 How. 200.

18. A writ of error in a criminal case cannot be granted by the circuit court clerk, it can only issue upon the fiat of the judge, or a court of competent jurisdiction. *Rockhold v. The State*, 5 How. 291.

19. The plaintiff in error sued out his writ of error and citation, in March, 1840, returnable to December term, 1840; in February, 1840, the legislature had changed the terms of the court from December to July; and the plaintiff afterwards sued out another citation on the first writ of error, and had it made returnable to the July term, 1840; the court sustained the writ of error. *Wells v. Woodley*, 5 How. 484.

20. If the original writ of error bond, be sent to the high court, it will be sufficient; but if there were no bond, the writ of error would not be dismissed, it would affect the *supersedeas* only. *Ib.*

21. Where a writ of error bond appears in the record, it will be presumed to have been executed by the proper authority. *Ib.*

22. A citation directed to the plaintiff below, or his attorneys, naming them, to appear to a writ of error to a judgment against D. *et al*; without setting out the name of each defendant below, will be sufficient. *Demoss v. Camp*, 5 How. 516.

23. A release of errors, the consideration of which is forbearance to sue out the execution, is a bar to a writ of error in the case. *Barnes v. Moody*, 5 How. 636.

24. After the term has elapsed,

at which a cause has been dismissed for want of citation, it will not be reinstated at a subsequent term, on a showing of diligence in the party, and that it was the fault of the clerk that the citation did not issue. *Harper v. Lowry*, 6 How. 268.

25. See *Bills of Exchange and Promissory notes*, 105; maker of note having given forthcoming bond, does not bar writ of error of indorsee.

26. The dismissal of an appeal for want of jurisdiction, or irregularity not the fault of the party, does not bar a writ of error, notwithstanding the provision in the statute, that after an appeal, or writ of error is dismissed, another appeal or writ of error, shall not be allowed. *Bull v. Harrell*, 7 How. 9.

27. A writ of error will not lie at law, except from final judgment. *Porter v. Deterly*, 1 S. & M. 163. It will not lie, therefore, to the grant of a new trial, until after second verdict. *Bank of Lexington v. Taylor*, 2 S. & M. 27.

28. A writ of error, to the probate court, is demandable, as a matter of right, out of the high court of errors and appeals; or it may be obtained from the clerk of the probate court, by virtue of the act of May 13, 1837. *Green v. Whiting*, 1 S. & M. 579.

29. A writ of error is a matter of right, and issues without any condition. *Hardaway v. Biles*, 1 S. & M. 657.

30. The law requiring papers to be filed by the first day of the term of the high court is not repealed by the act providing for a separate docket for the three districts of that court, and authorizing errors to be assigned, on the day

the case is to be taken up ; where, therefore, a record is not filed on the first day of the term to which the writ of error is returnable, such writ will be dismissed, on the motion of the defendant therein, upon his docketing the case. *McGehe v. Caruthers*, 2 S. & M. 443.

31. A third party, a stranger to the record, who claims the right of the appropriation to him of money made, under execution, cannot prosecute a writ of error, from a judgment of the court, allotting the money to another person, still not a party to the record, but claiming as assignee also. *Dougherty v. Compton*, 3 S. & M. 100.

32. A writ of error, issued by the clerk of the circuit court, under the act of 1837, is subject to the statute of limitations, requiring writs of error to be sued out, within three years from the rendition of the judgment. *Briscoe v. Planters Bank*, 3 S. & M. 423.

33. It is not a good plea, in bar of a writ of error to reverse a judgment in debt, that the plaintiff in error has, since the judgment, assigned certain claims to the defendant in error, in satisfaction of the judgment ; notwithstanding such satisfaction, the judgment may be reversed ; *aliter*, perhaps, if it had been a *real* action. *Gordon v. Gibbs*, 3 S. & M. 473.

34. A writ of error does not lie from a decree of the circuit court, overruling a demurrer to a bill in chancery, on its chancery side ; such decree is not a final judgment. *Heckingbottom v. Shell*, 3. S. & M. 588.

35. The absence from the record, of the petition for a writ of error issued by the circuit clerk, under the statute, will not cause a dismissal of the cause from the

high court ; the presumption is, the clerk acted correctly. *Tombigbee Railroad Co. v. Bell*, 4 S. & M. 685.

36. A writ of error may issue from the circuit clerk's office, without a bond previously executed, where no *supersedeas* is sought. *Ib.*

37. Where a forthcoming bond has been quashed, and a writ of error issued to the original judgment, and that writ recites as parties to the record, as well the sureties in the forthcoming bond, as the parties to the original judgment ; *held*, that the writ of error sufficiently identified the record. *Ib.*

38. Where the record contained an entry of satisfaction of the judgment, the propriety of which entry the plaintiff therein sought to revise ; *held*, that that entry, would not, of itself, be sufficient ground to dismiss the writ of error. *Ib.*

See *Probate Court*, 25. A writ of error will not lie, except from final judgment of the probate court.

39. If one of two defendants in a judgment, prosecutes a writ of error, and the suit is dismissed for want of prosecution, it will be no ground for reinstating it, that the defendant who had not joined in the writ of error, was dead, when the writ was dismissed. *Preira v. Silva*, 4 S. & M. 735.

40. Where the plaintiff in error ordered citations, on the day the writ of error was sued out ; and, as soon as they were issued, sent them to the sheriffs of the counties, where the different defendants resided, the writ of error will not be dismissed, if the sheriffs fail to execute them ; the plaintiff has used due diligence. *Wilcox v. Mitchell*, 4 S. & M. 744.

41. Where a writ of error is prosecuted, it is sufficient, if the citation be served on the attorney of record, in the court below. *Ib.*

42. Though, by a general rule, a writ of error cannot be prosecuted after forfeiture of a forthcoming bond, yet, if that bond be the subject of a motion and judgment, a writ of error may be granted to

reverse that. *Puckett v. Graves*, 6 S. & M. 384.



WRIT OF ERROR CORAM NOBIS.

See *Damages*, 3 ; for damages, on affirmance of judgment of the court below, dismissing such writ.

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Congress has also testified its high sense of the merits of the edition by SANCTIONING it, by a special act, which is inserted below.

To the Hon. J. Y. Mason, Attorney-General of the United States.

SIR:—The undersigned, the Joint Committee of the last Congress upon the Library, having had an opportunity of examining the first volume of the new edition of the Laws and Treaties of the United States, published by Messrs. Little & Brown, under the resolve of the last session, passed in pursuance of the report of that committee, have thought it might not be improper to express an opinion upon this specimen of the work. And we have great satisfaction in saying, that it most fully answers the expectations with which we recommended, and with which, as we think, Congress invited the publication of this edition. It conforms substantially to the plan which the resolve instructed, improving upon it where it differs at all; is executed with great mechanical neatness; and if the whole shall be completed as it is here begun, the government, the profession, and the country, will have the entire series of all our public and private legislation, in force or obsolete, and of all our diplomacy, in a natural, easy arrangement, for consultation and reference; with very perfect indices, with references in the margin, and notes to all the other Statutes, Resolves, or Treaties, relating to the matter of the text, and to all Judicial Decisions of all the Federal courts applicable to the same matter; constituting an absolutely authoritative national work. We learn that every law and treaty has been carefully collated with the originals in the Department of State.

It was deemed of much importance that the judgment of the Attorney-General should be pronounced upon the successive volumes of the edition, as they should appear, and before they should be accepted, and we think the publishers may with great confidence hope for your approval of this first of the series.

We have the honor to be, with great respect,

Your obedient servants,

RUFUS CHOATE,	} Committee on the part of the	
BENJ. TAPPAN,		Senate, 28th Congress.
J. A. PEARCE.		
EDMUND BURKE,	} Committee on the part of	
W. B. MACLAY,		the House of Represent-
GEORGE P. MARSH,		atives, 28th Congress.

To the Hon. Rufus Choate, Hon. Benj. Tappan, Hon. J. A. Pearce; Edmund Burke, W. B. Maclay, George P. Marsh.

ATTORNEY GENERAL'S OFFICE, APRIL 1st, 1846.

GENTLEMEN:—I have had the honor to receive your communication, accompanying the first volume of the new edition of the Laws of the United States, published by Messrs. Little & Brown, Boston. The publishers have now delivered five volumes, containing all the general laws; and it has given me great pleasure to have it in my power to certify the highly satisfactory character of this portion of the work. It is, in the highest degree, creditable to the publishers.

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My own experience in a judicial office has impressed me with the great value of such a publication, and I am happy to have contributed, in any degree, in the preparation of so creditable a work.

I have the honor to be, with the highest respect,

Your obedient servant,

J. Y. MASON.

Extract from the Act of Congress, August 8th, 1846.

"And whereas said edition of the said LAWS AND TREATIES OF THE UNITED STATES has been carefully collated and compared with the original Rolls in the Archives of the Government under the inspection and supervision of the Attorney General of the United States, as duly certified by that officer: Therefore, be it further enacted, that said edition of the LAWS AND TREATIES OF THE UNITED STATES, published by LITTLE & BROWN, is hereby declared to be competent evidence of the several public and private Acts of Congress and of the several Treaties therein contained in all the Courts of Law and Equity and Maritime Jurisdiction, and in all the Tribunals and Public Offices of the United States and of the several States, *without any further proof or authentication thereof.*"

SESSION LAWS.

Public Laws of the United States of America, passed at the First Session of the Twenty-ninth Congress, 1845 — 1846. Carefully collated with the Originals at Washington. Edited by George Minot, Counsellor at Law.

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